United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

LUTCHER S.A. CELULOSE E PAPEL,
CANDOI, PARANA, BRAZIL

and

F. LUTCHER BROWN,
CANDOI, PARANA, BRAZIL, *Appellants*

v.

INTER-AMERICAN DEVELOPMENT BANK,
808 17TH STREET, N. W., WASHINGTON, D. C., *Appellee*

On Appeal from an Order of the United States District Court for the District of Columbia

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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JOINT APPENDIX

Docket Entries

1966—Deposit for cost by
Mar. 4—Complaint, appearance. filed.
Mar. 4—Summons, copies (1) and copies (1) of Complaint issued. Served 3/7/66.
Mar. 4—Motion of Pltf, for Preliminary Injunction; P & A; Affidavit. M.C. filed.
Mar. 7—Jury demand of pltf, per counsel. filed.
Mar. 9—Appearance of William D. Rogers and Richard B. Sobol as attys. for deft. filed.
Mar. 14—Motion of deft. to dismiss; c/m 3/14/66; M.C. 3/14/66. filed.
Mar. 14—Memorandum of P & A of deft. in support of motion to dismiss and in opposition to motion of pltf. for preliminary injunction; c/m 3/14/66; affidavit; appendix I, II & III. filed.
Mar. 21—Opposition of pltfs. to deft's motion to dismiss; c/m 3/21/66. filed.
Mar. 28—Memorandum opinion denying pltfs' motion for preliminary injunction and granting deft's motion to dismiss complaint. (N) (signed 3/25/66). Gasch, J.
Mar. 28—Order denying pltfs' motion for preliminary injunction and granting deft's motion to dismiss complaint. (signed 3/25/66) (N). Gasch, J.
Mar. 31—Notice of appeal of pltf. Deposit $5.00 by Rayner. Copy mailed to Elting Arnold and notices to William D. Rogers and Richard B. Sobol. filed.
Apr. 7—Transcript of proceeding 3/25/66; pp 1-40 (Rep: R. Romig) Court's copy. filed.
Apr. 14—Motion of pltf. to post cash in lieu of Cost Bond on appeal; c/m 4/14/66. MC 4/14/66 filed.
Apr. 14—Deposit by pltf. of $250.00 cash in lieu of cost bond on appeal.
Apr. 14—Order granting motion of pltfs. to post $250.00 in lieu of bond to secure costs on appeal. (N). McGarraghy, J.
May 3—Transcript of proceedings 3/25/66; pp. 1-40. (Rep. Edna B. Romig) (Atty's copy). filed.
May 6—Record on appeal delivered to USCA. Deposit by Rayner 80¢. filed.
May 6—Receipt from USCA for original papers. filed.

(Filed March 4, 1966)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 573-'66

LUTCHER S.A. CELULOSE E PAPEL,
CANDOI, PARANA, BRAZIL

and

F. LUTCHER BROWN,
CANDOI, PARANA, BRAZIL, *Plaintiffs*

v.

INTER-AMERICAN DEVELOPMENT BANK,
808 17TH STREET, N. W., WASHINGTON, D. C., *Defendant*

Complaint for Injunction and Damages

JURISDICTION

Plaintiffs, Lutcher S.A. Celulose e Papel, and F. Lutcher Brown, bring this action under Section 1332 of Title 28 of the United States Code and states and shows to the court:

Plaintiff Lutcher S.A. Celulose e Papel is a corporation organized and existing under the laws of Brazil. Plaintiff F. Lutcher Brown is a citizen of Brazil. Defendant Inter-American Development Bank is an international organization and has its principal office at 808 17th Street, N. W. in the District of Columbia. Article XI of the Articles of Agreement establishing the Inter-American Development Bank states that said Bank can sue and be sued in any court of competent jurisdiction wherever the said Bank has an office. The amount in controversy exceeds $10,000 exclusive of costs and interest.

The plaintiffs for their causes of action against the above-named defendant state and allege as follows:

1. F. Lutcher Brown is President of and the largest shareholder in Lutcher S.A. Celulose e Papel, hereinafter

referred to as Lutcher S.A., and he is also one of the largest creditors of Lutcher S.A.

2. Lutcher S.A. came into being about 1959 to engage in the industry of manufacturing paper pulp from timber resources owned by F. Lutcher Brown and Lutcher S.A. and affiliated companies, and also to engage in lumbering activities, in Brazil.

3. The Inter-American Development Bank, hereinafter referred to as IADB, commenced operations in October 1960 and in that same month Lutcher S.A. applied for a loan for the purpose of completing the construction of the Lutcher S.A. pulp plant at Candoi, State of Parana, in a remote and undeveloped region of Brazil. The Board of Directors of the IADB approved a loan of $4,700,000 to Lutcher S.A. and a loan contract was executed on June 14, 1961. Lutcher S.A. thereupon proceeded to complete the erection of its plant, the construction of a hydro-electric plant, and the planting of extensive tree plantations. This loan contract, Section 6.03, requires that within seven years from the date of the contract "at least 25% of all of its capital stock entitled to profit participation shall be held by members of the public other than the present principal shareholders".

4. Loans from the IADB are highly sought after because they afford more favorable terms, lower interest, etc., than loans from private banks. A few months after Lutcher S.A. executed the loan contract with the IADB for $4,700,000, F. Lutcher Brown was told by one John Delaplaine, an engineer employed by the IADB that Klabin Irmaos S.A., hereinafter referred to as the Klabin group, might request a loan from the IADB for the purported purpose of building a new mill near Lajes, State of Santa Catarina, Brazil. At that time the Klabin group was the largest and dominant factor in the entire pulp, paper industries and were a monopoly in the newsprint industry in Brazil. F. Lutcher Brown shortly thereafter sent a letter

to the said John Delaplaine, with a copy to one Philip Glaessner, the IADB loan officer who was in charge of the Brazil section of the IADB's Loan Division, in which Brown cautioned the IADB that there were serious doubts that the pulp market in Brazil would support both the Lutcher S.A. project then being built and the new Klabin plant.

5. In November 1961 F. Lutcher Brown learned that the IADB was in fact considering the granting of a loan to the Klabin group. Brown came to Washington and had several meetings with representatives of the IADB. In the course of these meetings the IADB representatives disclosed to Brown the market data submitted by the Klabin group to justify its request for a loan and Brown pointed out a fundamental flaw in the data which the IADB was considering and on which it would determine its loan to the Klabin group. Notwithstanding this warning from Brown and his protests, the IADB on January 22, 1962 executed a loan contract for $5,000,000 with the Klabin group. But the Klabin group did not then commence construction and, on information and belief, the plaintiffs allege that the Klabin group still have not commenced construction.

6. In late 1962, Brown became aware that the IADB was about to grant a loan to Compania Manufacturera Papeles y Cartones S.A., for further expansion of the largest pulp and paper and newsprint facility in Chile. In the total pulp and paper industry this company has a monopoly position. Again Brown cautioned the Bank to study the pulp market in Latin America, lest the expansion of Papeles y Cartones result in an over-supply and thereby jeopardize the prospects of Lutcher S.A. Brown protested the granting of a loan to Papeles y Cartones but the IADB nevertheless executed a loan contract for $15,500,000 on November 23, 1962.

7. The loan contract of June 14, 1961 between Lutcher S.A. and the IADB provided that of the total loan of

$4,700,000, $2,500,000 was to be disbursed in dollars and the equivalent of $2,200,000, calculated at the free market rate of exchange, was to be disbursed in cruzeiros in Brazil. When Lutcher S.A. began to receive the "cruzeiros portion" of the loan the Brazilian monetary authorities fixed the rate of exchange and the result was that Lutcher S.A. received fewer cruzeiros per loan dollar than it or the IADB contemplated. Lutcher S.A. protested to the IADB the breach of its loan contract and Lutcher S.A. pointed out that the actions of the Brazilian monetary authorities contravened the Articles of Agreement establishing the IADB and that it was within the power of the IADB to cure the breach of the loan contract. The IADB rfeused to act and Lutcher S.A. initiated an arbitration proceeding in March 1964. The initial determination of the arbitration tribunal was that Lutcher S.A. prevailed on the merits and the tribunal ordered the IADB and Lutcher S.A. to arrive at precise damage figures. The maximum liability of the IADB was approximately $1,200,000. Because the IADB did not want this result of the arbitration to became a matter of permanent record in its financial statements, the IADB proposed that the controversy subject of the arbitration be compromised and settled by the IADB's giving an additional loan of $4,000,000 to Lutcher S.A. The IADB's theoretical basis for this loan was that it would enable Lutcher S.A. to double its capacity and thereby reduce its operating costs. The loan contract was executed on May 1, 1964. Lutcher S.A. has drawn down all but $45,648 of this loan.

8. During 1965 Lutcher S.A. frequently advised the IADB that business conditions in Brazil, particularly as they related to and affected Lutcher S.A. were extremely difficult. To some extent these conditions were the result of policies implemented by the revolutionary government in order to curb the rampant inflation that had developed during the regime of the ousted Joao Goulart. But another factor was that the Brazilian pulp and paper market had

not grown as anticipated and there was not an adequate market for the products of Lutcher S.A.

9. During the latter part of 1965, Brown learned that the Klabin group was again trying to borrow funds in the United States, Europe and Brazil to carry out the construction of its facility for which it had obtained the 1961 loan of $5,000,000 from the IADB. On information and belief, the plaintiffs allege that the Klabin group cannot obtain this financing without the clearance of the IADB and a modification of the loan contract between the IADB and the Klabin group.

10. On December 15, 1965, Lutcher S.A. was due to make to the IADB a payment on its loans totaling $470,915.54. Lutcher S.A. did not have the funds available but the principals of Lutcher S.A.—primarily F. Lutcher Brown—were endeavoring to obtain new investors in the company who would supply necessary funds. Lutcher S.A. wrote to the IADB on Novcember 19, 1965 requesting a 90 day extension of the payment date and Lutcher S.A. proposed that the IADB and Lutcher S.A. agree to utilize the $45,648 undisbursed under the second loan to Lutcher S.A. be used to employ an independent firm or firms to (a) study the Lutcher S.A. project and to (b) study the pulp and paper market. On December 14, 1965, the Executive Vice President of the IADB and its General Counsel advised representatives of Lutcher S.A. that the IADB would not grant the extension of the payment date, but that if Lutcher S.A. made the December 15, 1965 payment by December 31 when the IADB closed its books the IADB would agree to the independent study of Lutcher S.A. and the pulp and paper market. Relying upon this representation F. Lutcher Brown provided more funds and Lutcher S.A. made the payment within the allowed time and there were several meetings with IADB representatives to discuss how to proceed with the agreed upon study. At all of these meetings representatives of Lutcher S.A. stressed

the importance of the market study. And they directed the attention of the IADB representatives to a market study published by the National Development Bank of Brazil which showed that there was not a sufficient market for both Lutcher S.A. and the new Klabin mill. The IADB representatives agreed to draft terms of reference for the study including consideration of the National Development Bank's study, and to submit along with the proposed terms of reference a list of firms from which Lutcher S.A. might select the firm or firms to make the study.

11. Representatives of the IADB implied to the Lutcher S.A. representatives that the management of the IADB would not decide its course of action in connection with the clearance of the Klabin group's project until after the market study which the IADB agreed with Lutcher S.A. should be made by an independent firm. Lutcher S.A. representatives notably F. Lutcher Brown, repeatedly stated that the market was adequate for only one of the entities—either the expanded Klabin facility or the Lutcher S.A. plant. F. Lutcher Brown expressed his willingness to sell the physical assets of his plant to the Klabin group for their expansion or to withdraw from the industry through an orderly liquidation of its assets. F. Lutcher Brown requested William W. Rayner, one of the attorneys for Lutcher S.A., to seek an appointment in Washington, D. C. with Israel Klabin in November 1965 to suggest that the Klabin group and Lutcher S.A. merge. The Klabin group rejected this suggestion.

12. On February 21, 1966 the IADB gave to Lutcher S.A. the proposed terms of reference for the study which had been agreed upon and the terms of reference made no mention of studying the market. At a meeting at the IADB on February 21, 1966, the General Counsel of the IADB acknowledged that the terms of reference proposed by the IADB were a complete departure from the original agreement in that the market study had been omitted.

13. When the IADB granted the loan to the Klabin group in October 1961 on the basis of market data which the IADB knew to be erroneous, the IADB knowlingly carried out wrongful acts. The actions of the IADB created economic conditions which hindered Lutcher S.A. in its fulfilling its contractual obligations to the IADB to erect and operate a pulp mill and to repay its loans to the IADB. The IADB has a duty to its borrowers, and under its loan contracts with Lutcher S.A. it impliedly warranted, to lend prudently so as not to place them in jeopardy. The defendant IADB breached this duty in giving the loan to the Klabin group and unless enjoined by this court the defendant will knowingly and wrongfully perpetuate and compound its prior wrongful actions.

14. Plaintiffs allege, on informaiton and belief, that Israel Klabin is presently in Washington, D. C. to negotiate with the IADB its clearance for the Klabin group to incur additional substantial long-term debts in order to proceed with its new plant.

15. Plaintiffs allege that unless the defendant is enjoined it will grant the aforementioned clearance.

16. Plaintiffs allege that they have been damaged by the defendant's having knowingly carried out wrongful acts with reckless disregard for the rights of the plaintiffs and said actions by the defendant have caused great uncertainty as to the viability of the Lutcher S.A. project and Lutcher S.A. has therefore been unable to obtain or retain customers, to obtain credit, or to interest additional investors to come into the company and defendant has thereby caused the untenable insolvency of Lutcher S.A. Because of the known limitations of the pulp and paper market in Lating America, the defendant's aforementioned actions have conveyed the impression that if only one of the two entities—Lutcher S.A. or the Klabin group—can survive, the defendant intends to support the Klabin group.

17. Unless the defendant is enjoined as prayed herein the plaintiffs will be irreparably damaged in that Lutcher S.A., already driven into unsupportable insolvency, will be deprived of any possibility of recovery of any value from assets that may be remaining.

18. Lutcher S.A. has built an entire town at its plant site —hundreds of homes, an elementary school and a high school, a hospital, and several churches. Thousands of people will be stranded in a remote region without any source of income. The threat of rioting and destruction of property—including the assets of Lutcher S.A. is real and imminent.

19. It is necessary that the defendant be enjoined as prayed herein in order to restore the confidence of the investors, management, and employees of Lutcher S.A. which has been severely damaged by the past negligent and reckless actions of the defendant and the imminent threat of said actions being perpetuated and compounded by the IADB's pending actions in relation to granting its clearance to the Klabin group to incur additional indebtedness and modifying its loan contract with the Klabin group.

20. The Klabin group must face the same economic conditions in Brazil as does Lutcher S.A. The defendant proposes to attempt to assist the Klabin group by enabling them to obtain additional loans. And the defendant has suggested to Lutcher S.A. that additional loans might be forthcoming to it. But repeated infusions of additional loans will not cure the situation. Additional loans will only increase the debt burdens of each entity as they expand their respective capacity far beyond what the market can absorb.

21. The reckless and improvident actions of the defendant have hindered plaintiffs in their efforts to perform Section 6.03 of the loan contract dated June 14, 1961 and the granting of clearance for expansion of the Klabin

group's project will permanently and irreparably damage plaintiffs in those efforts and force Lutcher S.A. into a position of default under its loan contract.

WHEREFORE, Plaintiffs pray that:

1. The defendant be temporarily and permanently enjoined from giving clearance to the Klabin group to incur additional indebtedness to construct a new pulp and paper facility for the term of defendant's loan with plaintiff Lutcher S.A.

2. The defendant be temporarily and permanently enjoined from financing directly or indirectly; i.e., through any member's government or central bank, or by any other means any pulp or paper facility in Brazil during the term of defendant's loans with Lutcher S.A. or from foreclosing upon Lutcher S.A. under its loan contracts.

3. The defendant be enjoined pendente lite from disposing of, destroying or removing from Washington, D. C. any files, records, correspondence, letters, memoranda, telephone records, expense account records and vouchers, and/or any and all other papers from the date the defendant was organized.

4. The defendant, its agents and employees be enjoined pendente lite from transferring, assigning or ordering any person now in defendant's employ out of the jurisdiction of this court without adequate assurance to the court that any person so transferred, assigned or ordered from said jurisdiction will be made available for depositions, discovery and/or trial.

5. The defendant, its agents and employees be enjoined from transferring any funds in excess of $1,000 outside the United States unless the defendant is advised of such transfer and the defendant agrees to maintain a record of such transfers and to make said record available for inspection by the plaintiffs.

6. The plaintiffs be awarded damages plus interest, cost and reasonable attorneys fees.

7. The court award such other and further relief as may be justified in the premises.

*Jury trial on all issues is demanded.**

WILLIAM W. RAYNER
William W. Rayner
1032 Shoreham Building
Washington, D. C.
Attorney for plaintiffs

Of Counsel:

WHITLOCK, MARKEY & TAIT

VERIFICATION

F. Lutcher Brown, being first duly sworn, avers that he has read the foregoing Complaint and that the facts alleged therein are known to him by personal knowledge or are believed as information to be true to the best of his knowledge.

F. LUTCHER BROWN
F. Lutcher Brown

Subscribed and sworn to before me this 1st day of March, 1966.

G. J. GOLDBERG
Notary Public, D. C.

My Commission Expires
Feb. 28, 1969

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* WWR added by praecipe 3/7/66 and added to service copy.

Motion for Preliminary Injunction

Plaintiffs, Lutcher S.A. Celulose e Papel and F. Lutcher Brown, move the court under Rule 65 of the Federal Rules of Civil Procedure, 26 U.S.C.A., for a Preliminary Injunction restraining the defendant, its officers, agents, employees and representatives from:

1. Giving clearance to the Klabin group to incur additional indebtedness to expand its pulp and paper facility for the term of defendant's loans with plaintiff Lutcher S.A.;

2. Financing directly or indirectly; i.e., through any member's government or central bank, or by any other means, any pulp or paper facility in Latin America during the term of defendant's loans with plaintiff Lutcher S.A.;

3. Disposing of, destroying or removing from Washington, D. C., any files, records, correspondence, letters, memoranda, telephone records, expense account records and vouchers, and/or any and all other papers from the date the defendant was organized;

4. Transferring, assigning or ordering any person now in defendant's employ out of the jurisdiction of this court without adequate assurance to the court that any person so transferred, assigned or ordered from said jurisdiction will be made available for depositions, discovery and/or trial;

5. Transferring any funds in excess of $1,000 outside the United States unless the defendant is advised of such transfer and the defendant agrees to maintain a record of such transfers and to make said record available for inspection by the plaintiffs.

The grounds in support of this motion are:

1. The defendant made its first loan to a private entity to Litcher S.A. Celulose e Papel in June 1961. On the basis of this Agreement, F. Lutcher Brown and others proceeded to lend substantial sums to Lutcher S.A.;

2. The defendant Bank negligently and with a reckless disregard for the rights of the plaintiffs proceeded in 1961 to act on data which was critical and which the defendant knew was erroneous and granted a loan of $5,000,000 to the Klabin group for the purported expansion of its pulp mill. This action severely damaged the plaintiffs in that the impending entrance of an expanded Klabin into an inadequate market caused a loss of confidence in the prospects of Lutcher S.A.;

3. The Klabin group did not and has not commenced construction of that expansion but recently has sought additional loans from sources in the United States, Europe and Brazil for the alleged purpose of completing the expansion;

4. Other sources of financing will require the clearance of the defendant, and plaintiffs believe that it will be necessary for the defendant to agree to a modification of the loan contract between the defendant and the Klabin group;

5. There is no adequate market for two 200 ton per day pulp mills in Brazil. When the defendant made its very first industrial loan to Lutcher S.A., the defendant impliedly warranted that it would not recklessly grant loans which would deprive Lutcher S.A. of a market for its products;

6. Israel Klablin, representing the Klabin group, is believed to be in Washington, D. C., now to negotiate the necessary clearances and contract modifications with the defendant;

7. Unless the defendant is enjoined, the defendant will grant its clearance to the Klabin group and Lutcher S.A. will be denied any opportunity to seek an economic solution to its present difficulties;

8. Unless the defendant is enjoined, the damages already suffered will be compounded.

The plaintiffs have no adequate remedy at law.

If the Preliminary Injunction be granted, the injury, if any, to defendant herein if final judgment be in its favor, will be inconsiderable and can be adequately indemnified by bond.

LUTCHER S.A. CELULOSE E PAPEL
F. LUTCHER BROWN

By: WILLIAM W. RAYNER
William W. Rayner
Attorney for Plaintiffs
1032 Shoreham Building
Washington, D. C.
NAtional 8-1960

Of Counsel:

WHITLOCK, MARKEY & TAIT
1032 Shoreham Building
Washington, D. C.

Plaintiffs' Affidavit in Support of Motion for Preliminary Injunction

DISTRICT OF COLUMBIA: SS

F. LUTCHER BROWN, being first duly sworn, deposes and says:

1. I am a citizen and a resident of Brazil. I am the President of Lutcher S.A. Celulose e Papel, a Brazilian corporation, and also its largest shareholder.

2. In 1959, after several years of planning and acquiring timber lands, I began to construct the Lutcher S.A. Celulose e Papel pulp mill at Candoi, State of Parana, Brazil. The plant site is located in a remote and completely undeveloped region and it was necessary to erect an entire town—homes for the workers, schools, roads, a hospital, churches and all the other facilities.

3. On June 14, 1961, I executed on behalf of Lutcher S.A. a loan contract with the defendant for $4,700,000. Having this commitment from the defendant and relying on the implied obligation of the defendant not to act in a negligent and reckless manner of fostering additional unnecessary capacity in the pulp industry, the plaintiffs continued to put substantial sums of money into the completion of the project.

4. The plaintiffs were required to agree, as a condition of the loan subject to the June 14, 1961 contract, that "within seven years from the date of [that] Contract, at least 25% of all of its capital stock entitled to profit participation shall be held by members of the public other than the present principal shareholders". The actions of the defendant in improvidently lending funds to other pulp facilities will make it impossible for plaintiff Lutcher S.A. to fulfill this contractual commitment because knowledgeable investors can see that the market will not support all the pulp mills being financed directly and indirectly by the defendant and making it impossible for this now insolvent company to recover.

5. On January 22, 1962 the defendant contracted to lend Klabin Irmaos S.A., the largest pulp and paper entity in Brazil, $5,000,000 to build a new pulp mill in the State of Santa Catarina, Brazil. The Klabin group did not commence erection of that plant but they are now seeking additional financing for this purpose. In order to complete these financing arrangements the Klabin group must have the clearance of the defendant. The pendency of the defendant's clearance of the Klabin project is presently hindering the plaintiffs in their immediate efforts to obtain financial assistance and this has caused an emergency situation to come into being at the plant site. If the defendant's policies and actions vis-a-vis plaintiff Lutcher S.A. and other pulp mills in Brazil are not immediately stabilized, the collapse of Lutcher S.A. is imminent and

thousands of persons located in a remote region of Brazil who are entirely dependent upon Lutcher S.A. will be in a situation of great distress and there is an imminent danger of rioting and destruction of property.

6. The events and facts set forth in the verified complaint filed herein show that the plaintiffs have been damaged and they face imminent irreparable damages.

Respectfully submitted,

F. L. Brown
F. Lutcher Brown

Subscribed and sworn to before me this 1st day of March, 1966.

G. J. Goldberg
Notary Public D. C.

My Commission Expires Feb. 28, 1968.

Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction

To grant or withhold issuance of a preliminary injunction, under Rule 65 of the Federal Rules of Civil Procedure, is a matter of discretionary determination by the district court.

As stated by the Court of Appeals for the District of Columbia Circuit, *Embassy Dairy* v. *Camalier,* 211 F. 2d 41, 43 (1954):

> "Whether or not a preliminary injunction should issue is ordinarily a matter for the discretion of the District Court to be exercised upon this series of estimates: 'the relative importance of the rights asserted and the acts sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success

or failure of the suit, the balance of damage and convenience generally.' "

The plaintiffs have alleged in a verified complaint, and have supported by separate affidavit, facts which show that unless the defendant is preliminarily enjoined pending the final outcome of this case, plaintiffs will be irreparably damaged.

The facts set forth by the plaintiffs show that the imminent appearance of an additional pulp mill in the Brazilian economy will inevitably lead to a condition of over-supply and that the immediate probability of defendant's paving the way for such an additional facility has already caused plaintiffs to be damaged and threatens irreparable damage unless the defendant is enjoined. Far from being damaged by the issuance of this preliminary injunction, the defendant will be benefited, in that the defendant will be restrained from committing an action contrary to its best interest.

The defendant embarked on an erroneous path when it loaned the Klabin group $5,000,000, and the defendant should be enjoined from continuing on that path. The facts set forth in plaintiff's verified complaint and affidavit indicate a probability of ultimate success by the plaintiffs.

Respectfully submitted,

William W. Rayner
William W. Rayner
1032 Shoreham Building
Washington, D. C.
Attorney for Plaintiffs

Of Counsel:

Whitlock, Markey & Tait

Motion To Dismiss

Defendant Inter-American Development Bank moves, pursuant to Rules 12(b)(1), (b)(2) and (b)(6) of the Federal Rules of Civil Procedure, to dismiss the complaint in this action on the grounds that:

1. The defendant is immune from this suit by virtue of the provisions of the International Organizations Immunities Act (59 Stat. 699, 22 U.S.C. § 288a) and the Agreement Establishing The Inter-American Development Bank, which are made fully applicable within the United States by the Inter-American Development Bank Act (73 Stat. 301, 22 U.S.C. §§ 283-283k);

2. Plaintiff is without standing to maintain this action against the defendant;

3. Plaintiff has failed to state a claim upon which relief can be granted.

WILLIAM D. ROGERS
William D. Rogers

Richard B. Sobol
1229 19th Street, N. W.
Washington, D. C. 20036
Attorneys for Defendant

Of Counsel:

ARNOLD & PORTER
1229 19th Street, N. W.
Washington, D. C. 20036

Dated: March 14, 1966

UNITED STATES OF AMERICA
DISTRICT OF COLUMBIA } ss.

Affidavit

T. Graydon Upton, being duly sworn, deposes and states:

1. I am a citizen of the United States and am the Executive Vice President of the Inter-American Development Bank (hereinafter "the Bank") with offices at 808 17th St., N. W., Washington, District of Columbia.

2. The Inter-American Development Bank is an international institution created by agreement entered into on December 30, 1959. All the Republics of the Western Hemisphere, except Cuba, are signatories to the Agreement and have accepted membership as provided for by the Agreement. The Government of the United States accepted membership in the Bank by an Instrument of Acceptance dated September 10, 1959. In accordance with Article XV of the Agreement Establishing the Bank, this Instrument certifies that the "Government of the United States of America accepts that Agreement in accordance with its law and has taken the steps necessary to enable it to fulfill all of its obligations thereunder".

3. Pursuant to Article I of the Agreement Establishing the Bank its purpose is to further the economic development of its member countries, individually and collectively. To implement its basic objective the Bank makes loans for projects of economic priority to private or governmental borrowers in the member countries.

4. The Bank was created with two completely separate resources—its Ordinary Capital resources and its Fund for Special Operations. The Bank also administers other resources, including the Social Progress Trust Fund, a fund made available by the Government of the United States.

a. *Ordinary Capital Resources.* The Bank's Ordinary Capital resources are currently authorized at $2,150,000,000.

Of this amount $475,000,000 corresponds to "paid-in" capital and $1,675,000,000 to "callable" capital. The United States has paid $150 million into the "paid-in" capital and has subscribed $611,760,000 of the callable capital.

b. *Fund For Special Operations.* Contributions made by the member countries to the Fund for Special Operations amount at present to $820,391,500. An additional $296,806,000 is due to be paid by December 31, 1966. Of the amount already contributed, the United States has provided $650 million and the Latin American member countries $170,391,500. The purpose of this Fund is to enable the Bank to make loans under easier terms and conditions than those applying to loans made from the Ordinary Capital Resources. The scope of the Fund was expanded in 1965 to include social development projects previously financed with the Social Progress Trust Fund.

c. *Social Progress Trust Fund.* Under an agreement signed with the United States Government, the Bank in 1961 became the Administrator of the Social Progress Trust Fund, to which the United States has allocated $525 million. The Bank has used this Fund to foster social development in Latin America in the fields of land settlement, housing for low-income groups, water supply and sewage facilities, and advanced education. The resources of this Fund became practically exhausted in 1965. However, by decision of the Board of Governors, the Bank may now extend loans for projects previously financed by the Trust Fund from its Fund for Special Operations.

5. The callable portion of the ordinary capital is a contingent liability of the subscribing countries which can be called only, and to the extent necessary, to meet obligations of the Bank on securities which it has issued for sale in the financial markets. The paid-in capital provided the Bank with lendable resources only in the first year of operation and the Bank has been obliged to raise

its ordinary capital funds by the sale of its bonds in the capital markets of the world. The callable obligation of the United States is the primary source of strength of the Bank's bonds. The Bank has marketed seven bond issues totalling $296.8 million, and has made one direct borrowing of $15 million. Three of these issues, totalling $225 million, were sold in the United States and the remaining four, aggregating $71.8 million, were sold in Italy, Germany, and the United Kingdom. The bonds issued in the United States are rated "AAA" by the primary rating services and are listed on the New York stock exchange. Some 34 states of the United States have passed legislation or taken administrative action qualifying the Bank's bonds as legal investment by state-regulated institutional investors such as commercial and savings banks, life insurance companies, trustees, and state and local pension funds. The Bank also sells participations in the Bank's loans to commercial banks and other financial institutions. As of December 31, 1965 the Bank had sold participations in 56 loans to 48 commercial banks in the United States, 10 in Europe, two in Canada, one in Japan, and to the United Nations Special Fund.

6. As of December 31, 1965, the total amount committed by the Bank in loans from its own resources and those it administers, amounted to $1,527.5 million. The lending volume averaged approximately $300 million a year between 1961 and 1964, and rose to $373.5 million in 1965. The total cost of the projects financed is estimated at approximately $4,200 million. Thus, the Bank is helping to mobilize approximately $2,670 million of other resources, primarily those of the borrowing countries, representing approximately two thirds of the total investment. As of December 31, the cumulative amount disbursed totalled $586.3 million, or nearly 40 percent of the amount committed.

7. One of the fundamental characteristics of the Bank's loan operations has been the wide variety and scope of

the fields covered. In the area of economic development, loans have been made for power and transportation projects, agriculture, industry, and mining. In the social field, the Bank has financed housing projects for low-income groups, water supply and sewerage projects, improvements in land use and tenure, and education projects.

8. The basic authority of the Bank is vested in the Board of Governors composed of one Governor from each member country, generally its Minister of Finance or Economy. The Secretary of the Treasury is the Governor for the United States. The direction of the Bank's operations is entrusted to the Board of Executive Directors, the President of the Bank, who is elected by the Board of Governors, and the Executive Vice President, elected by the Board of Executive Directors. The Board of Executive Directors consists of 7 members, 6 of whom are elected by the member countries, and the United States Executive Director who is appointed by the President of the United States and confirmed by the Senate. Voting in the Board of Governors and the Board of Executive Directors is based on the number of shares subscribed by each member to the capital stock of the Bank. The U. S. has 41% of the vote.

The President of the Bank is the chief of its staff, which, as of December 31, 1965, totalled 321 professionals and 344 administrative personnel drawn from all of the member countries. In addition to its main office in Washington, the Bank has Regional Offices in 15 of its member countries and a special representative in Europe located in Paris, France. Resident engineers are stationed in 13 countries.

9. Disbursements by the Bank are currently running between $15 and $20 million per month.

10. Attached hereto are the following exhibits:

a. The Agreement Establishing the Inter-American Development Bank, as amended;

b. The Loans Agreements between the Bank and Lutcher S.A. Celulose E Papel;

c. The Loan Agreement between the Bank and Papel E Celulose Catarinenie Ltda. ("Klabin"), dated June 9, 1965.

T. G. UPTON
T. Graydon Upton

Subscribed and sworn to before me
this 14th day of March, 1966.

BETTY S. MURPHY
Notary Public

My Commission Expires Nov. 14, 1967

[SEAL]

Appendix I

AGREEMENT ESTABLISHING THE INTER-AMERICAN DEVELOPMENT BANK

AGREEMENT ESTABLISHING THE INTER-AMERICAN DEVELOPMENT BANK

INTER-AMERICAN DEVELOPMENT BANK
Washington, D.C.
1965

THE CONTENTS

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CONTENTS

AGREEMENT ESTABLISHING THE INTER-AMERICAN DEVELOPMENT BANK

The countries on whose behalf this Agreement is signed agree to create the Inter-American Development Bank, which shall operate in accordance with the following provisions:

ARTICLE I
PURPOSE AND FUNCTIONS

Section 1. **Purpose**

The purpose of the Bank shall be to contribute to the acceleration of the process of economic development of the member countries, individually and collectively.

Section 2. **Functions**

(a) To implement its purpose, the Bank shall have the following functions:

(i) to promote the investment of public and private capital for development purposes;

(ii) to utilize its own capital, funds raised by it in financial markets, and other available resources, for financing the development of the member countries, giving priority to those loans and guarantees that will contribute most effectively to their economic growth;

(iii) to encourage private investment in projects, enterprises, and activities contributing to economic development and to supplement private investment when private capital is not available on reasonable terms and conditions;

(iv) to cooperate with the member countries to orient their development policies toward a better utilization of their resources, in a manner consistent with the objectives of making their economies more complementary and of fostering the orderly growth of their foreign trade; and

(v) to provide technical assistance for the preparation, financing, and implementation of development plans and projects, including the study of priorities and the formulation of specific project proposals.

(b) In carrying out its functions, the Bank shall cooperate as far as possible with national and international institutions and with private sources supplying investment capital.

ARTICLE II

MEMBERSHIP IN AND CAPITAL OF THE BANK

Section 1. **Membership**

(a) The original members of the Bank shall be those members of the Organization of American States which, by the date specified in Article XV, Section 1 (a), shall accept membership in the Bank.

(b) Membership shall be open to other members of the Organization of American States at such times and in accordance with such terms as the Bank may determine.

Section 2. **Authorized Capital**

(a) The authorized capital stock of the Bank, together with the initial resources of the Fund for Special Operations established in Article IV (hereinafter called the Fund), shall total one billion dollars ($1,000,000,000) in terms of United States dollars of the weight and fineness in effect on January 1, 1959. Of this sum, eight hundred fifty million dollars ($850,000,000)[1] shall constitute the authorized capital stock of the Bank and shall be divided into 85,000[2] shares having a par value of $10,000 each, which shall be available for subscription by members in accordance with Section 3 of this article.

(b) The authorized capital stock shall be divided into paid-in shares and callable shares. The equivalent of four hundred million dollars ($400,000,000)[3] shall be paid in, and four hundred fifty million dollars ($450,000,000)[4] shall be callable for the purposes specified in Section 4 (a) (ii) of this article.

(c) The capital stock indicated in (a) of this section shall be increased by five hundred million dollars ($500,000,000) in terms of United States dollars of the weight and fineness existing on January 1, 1959, provided that:

(i) the date for payment of all subscriptions established in accordance with Section 4 of this article shall have passed; and

(ii) a regular or special meeting of the Board of Governors, held as soon as possible after the date referred to in subparagraph (i) of this paragraph, shall have approved the above-mentioned increase of five hundred million dollars ($500,000,000) by a three-fourths majority of the total voting power of the member countries.

(d) The increase in capital stock provided for in the preceding paragraph shall be in the form of callable capital.

(e) Notwithstanding the provisions of paragraphs (c) and (d) of this section, the authorized capital stock may be increased when the Board of Gov-

[1] On January 28, 1964, the Board of Governors increased this amount to two billion one hundred and fifty million dollars ($2,150,000,000)

[2] The number of shares was increased by the Board of Governors on January 28, 1964, to 215,000 of which 30,000 shares are reserved for subscription by possible new members.

[3] This amount was increased by the Board of Governors on January 28, 1964, to four hundred and seventy-five million dollars ($475,000,000) of which seventy-five million dollars ($75,000,000) are reserved for possible new members.

[4] This amount was increased by the Board of Governors on January 28, 1964, to one billion six hundred and seventy-five million dollars ($1,675,000,000) of which two hundred and twenty-five million dollars ($225,000,000) are reserved for possible new members.

ernors deems it advisable and in a manner agreed upon by a two-thirds majority of the total number of governors representing not less than three-fourths of the total voting power of the member countries.

Section 3. **Subscription of Shares**

(a) Each member shall subscribe to shares of the capital stock of the Bank. The number of shares to be subscribed by the original members shall be those set forth in Annex A of this Agreement, which specifies the obligation of each member as to both paid-in and callable capital. The number of shares to be subscribed by other members shall be determined by the Bank.

(b) In case of an increase in capital pursuant to Section 2, paragraph (c) or (e) of this article, each member shall have a right to subscribe, under such conditions as the Bank shall decide, to a proportion of the increase of stock equivalent to the proportion which its stock theretofore subscribed bears to the total capital stock of the Bank. No member, however, shall be obligated to subscribe to any part of such increased capital.

(c) Shares of stock initially subscribed by original members shall be issued at par. Other shares shall be issued at par unless the Bank decides in special circumstances to issue them on other terms.

(d) The liability of the member countries on shares shall be limited to the unpaid portion of their issue price.

(e) Shares of stock shall not be pledged or encumbered in any manner, and they shall be transferable only to the Bank.

Section 4. **Payment of Subscriptions**

(a) Payment of the subscriptions to the capital stock of the Bank as set forth in Annex A shall be made as follows:

(i) Payment of the amount subscribed by each country to the paid-in capital stock of the Bank shall be made in three installments, the first of which shall be 20 per cent, and the second and third each 40 per cent, of such amount. The first installment shall be paid by each country at any time on or after the date on which this Agreement is signed, and the instrument of acceptance or ratification deposited, on its behalf in accordance with Article XV, Section 1, but not later than September 30, 1960. The remaining two installments shall be paid on such dates as are determined by the Bank, but not sooner than September 30, 1961, and September 30, 1962, respectively.

Of each installment, 50 per cent shall be paid in gold and/or dollars and 50 per cent in the currency of the member.

(ii) The callable portion of the subscription for capital shares of the Bank shall be subject to call only when required to meet the obligations of the Bank created under Article III, Section 4 (ii) and (iii) on borrowings of funds for inclusion in the Bank's ordinary capital resources or guarantees chargeable to such resources. In the event of such a call, payment may be made at the option of the

member either in gold, in United States dollars, or in the currency required to discharge the obligations of the Bank for the purpose for which the call is made.

Calls on unpaid subscriptions shall be uniform in percentage on all shares.

(b) Each payment of a member in its own currency under paragraph (a) (i) of this section shall be in such amount as, in the opinion of the Bank, is equivalent to the full value in terms of United States dollars of the weight and fineness in effect on January 1, 1959, of the portion of the subscription being paid.. The initial payment shall be in such amount as the member considers appropriate hereunder but shall be subject to such adjustment, to be effected within 60 days of the date on which the payment was due, as the Bank shall determine to be necessary to constitute the full dollar value equivalent as provided in this paragraph.

(c) Unless otherwise determined by the Board of Governors by a three-fourths majority of the total voting power of the member countries, the liability of members for payment of the second and third installments of the paid-in portion of their subscriptions to the capital stock shall be conditional upon payment of not less than 90 per cent of the total obligations of the members due for:

(i) the first and second installments, respectively, of the paid-in portion of the subscriptions; and

(ii) the initial payment and all prior calls on the subscription quotas to the Fund.

Section 5. **Ordinary Capital Resources**

As used in this Agreement, the term "ordinary capital resources" of the Bank shall be deemed to include the following:

(i) authorized capital, including both paid-in and callable shares, subscribed pursuant to Section 2 and 3 of this article;

(ii) all funds raised by borrowings under the authority of Article VII, Section 1 (i) to which the commitment set forth in Section 4 (a) (ii) of this article is applicable;

(iii) all funds received in repayment of loans made with the resources indicated in (i) and (ii) of this section; and

(iv) all income derived from loans made from the afore-mentioned funds or from guarantees to which the commitment set forth in Section 4 (a) (ii) of this article is applicable.

ARTICLE III

OPERATIONS

Section 1. **Use of Resources**

The resources and facilities of the Bank shall be used exclusively to implement the purpose and functions enumerated in Article I of this Agreement.

Section 2. **Ordinary and Special Operations**

(a) The operations of the Bank shall be divided into ordinary operations and special operations.

(b) The ordinary operations shall be those financed from the Bank's ordinary capital resources, as defined in Article II, Section 5, and shall relate exclusively to loans made, participated in, or guaranteed by the Bank which are repayable only in the respective currency or currencies in which the loans were made. Such operations shall be subject to the terms and conditions that the Bank deems advisable, consistent with the provisions of this Agreement.

(c) The special operations shall be those financed from the resources of the Fund in accordance with the provisions of Article IV.

Section 3. **Basic Principle of Separation**

(a) The ordinary capital resources of the Bank as defined in Article II, Section 5, shall at all times and in all respects be held, used, obligated, invested, or otherwise disposed of entirely separate from the resources of the Fund, as defined in Article IV, Section 3 (h).

The financial statements of the Bank shall show the ordinary operations of the Bank and the operations of the Fund separately, and the Bank shall establish such other administrative rules as may be necessary to ensure the effective separation of the two types of operations.

The ordinary capital resources of the Bank shall under no circumstances be charged with, or used to discharge, losses or liabilities arising out of operations for which the resources of the Fund were originally used or committed.

(b) Expenses pertaining directly to ordinary operations shall be charged to the ordinary capital resources of the Bank. Expenses pertaining directly to special operations shall be charged to the resources of the Fund. Other expenses shall be charged as the Bank determines.

Section 4. **Methods of Making or Guaranteeing Loans**

Subject to the conditions stipulated in this article, the Bank may make or guarantee loans to any member, or any agency or political subdivision thereof, and to any enterprise in the territory of a member, in any of the following ways:

(i) by making or participating in direct loans with funds corresponding to the unimpaired paid-in capital and, except as provided in Section 13 of this article, to its reserves and undistributed surplus; or with the unimpaired resources of the Fund;

(ii) by making or participating in direct loans with funds raised by the Bank in capital markets, or borrowed or acquired in any other manner for inclusion in the ordinary capital resources of the Bank or the resources of the Fund; and

(iii) by guaranteeing in whole or in part loans made, except in special cases, by private investors.

Section 5. **Limitations on Ordinary Operations**

(a) The total amount outstanding of loans and guarantees made by the Bank in its ordinary operations shall not at any time exceed the total amount of the unimpaired subscribed capital of the Bank, plus the unimpaired reserves

and surplus included in the ordinary capital resources of the Bank, as defined in Article II, Section 5, exclusive of income assigned to the special reserve established pursuant to Section 13 of this article and other income assigned by decision of the Board of Governors to reserves not available for loans or guarantees.

(b) In the case of loans made out of funds borrowed by the Bank to which the obligations provided for in Article II, Section 4 (a) (ii) are applicable, the total amount of principal outstanding and payable to the Bank in a specific currency shall at no time exceed the total amount of principal of the outstanding borrowings by the Bank that are payable in the same currency.

Section 6. **Direct Loan Financing**

In making direct loans or participating in them, the Bank may provide financing in any of the following ways:

(a) By furnishing the borrower currencies of members, other than the currency of the member in whose territory the project is to be carried out, that are necessary to meet the foreign exchange costs of the project.

(b) By providing financing to meet expenses related to the purposes of the loan in the territories of the member in which the project is to be carried out. Only in special cases, particularly when the project indirectly gives rise to an increase in the demand for foreign exchange in that country, shall the financing granted by the Bank to meet local expenses be provided in gold or in currencies other than that of such member; in such cases, the amount of the financing granted by the Bank for this purpose shall not exceed a reasonable portion of the local expenses incurred by the borrower.

Section 7. **Rules and Conditions for Making or Guaranteeing Loans**

(a) The Bank may make or guarantee loans subject to the following rules and conditions:

(i) the applicant for the loan shall have submitted a detailed proposal and the staff of the Bank shall have presented a written report recommending the proposal after a study of its merits. In special circumstances, the Board of Executive Directors, by a majority of the total voting power of the member countries, may require that a proposal be submitted to the Board for decision in the absence of such a report;

(ii) in considering a request for a loan or a guarantee, the Bank shall take into account the ability of the borrower to obtain the loan from private sources of financing on terms which, in the opinion of the Bank, are reasonable for the borrower, taking into account all pertinent factors;

(iii) in making or guaranteeing a loan, the Bank shall pay due regard to prospects that the borrower and its guarantor, if any, will be in a position to meet their obligations under the loan contract;

(iv) in the opinion of the Bank, the rate of interest, other charges and the schedule for repayment of principal are appropriate for the project in question;

(v) in guaranteeing a loan made by other investors, the Bank shall receive suitable compensation for its risk; and

(vi) loans made or guaranteed by the Bank shall be principally for financing specific projects, including those forming part of a national or regional development program. However, the Bank may make or guarantee over-all loans to development institutions or similar agencies of the members in order that the latter may facilitate the financing of specific development projects whose individual financing requirements are not, in the opinion of the Bank, large enough to warrant the direct supervision of the Bank.

(b) The Bank shall not finance any undertaking in the territory of a member if that member objects to such financing.

Section 8. **Optional Conditions for Making or Guaranteeing Loans**

(a) In the case of loans or guarantees of loans to nongovernmental entities, the Bank may, when it deems it advisable, require that the member in whose territory the project is to be carried out, or a public institution or a similar agency of the member acceptable to the Bank, guarantee the repayment of the principal and the payment of interest and other charges on the loan.

(b) The Bank may attach such other conditions to the making of loans or guarantees as it deems appropriate, taking into account both the interests of the members directly involved in the particular loan or guarantee proposal and the interests of the members as a whole.

Section 9. **Use of Loans Made or Guaranteed by the Bank**

(a) Except as provided in Article V, Section 1, the Bank shall impose no condition that the proceeds of a loan shall be spent in the territory of any particular country nor that such proceeds shall not be spent in the territories of any particular member or members.

(b) The Bank shall take the necessary measures to ensure that the proceeds of any loan made, guaranteed, or participated in by the Bank are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency.

Section 10. **Payment Provisions for Direct Loans**

Direct loan contracts made by the Bank in conformity with Section 4 (i) or (ii) of this article shall establish:

(a) All the terms and conditions of each loan, including among others, provision for payment of principal, interest and other charges, maturities, and dates of payment; and

(b) The currency or currencies in which payments shall be made to the Bank.

Section 11. **Guarantees**

(a) In guaranteeing a loan the Bank shall charge a guarantee fee, at a rate determined by the Bank, payable periodically on the amount of the loan outstanding.

(b) Guarantee contracts concluded by the Bank shall provide that the Bank may terminate its liability with respect to interest if, upon default by the borrower and by the guarantor, if any, the Bank offers to purchase, at par and interest accrued to a date designated in the offer, the bonds or other obligations guaranteed.

(c) In issuing guarantees, the Bank shall have power to determine any other terms and conditions.

Section 12. **Special Commission**

On all loans, participations, or guarantees made out of or by commitment of the ordinary capital resources of the Bank, the latter shall charge a special commission. The special commission, payable periodically, shall be computed on the amount outstanding on each loan, participation, or guarantee and shall be at the rate of one per cent per annum, unless the Bank, by a two-thirds majority of the total voting power of the member countries, decides to reduce the rate of commission.

Section 13. **Special Reserve**

The amount of commissions received by the Bank under Section 12 of this article shall be set aside as a special reserve, which shall be kept for meeting liabilities of the Bank in accordance with Article VII, Section 3 (b) (i). The special reserve shall be held in such liquid form, permitted under this Agreement, as the Board of Executive Directors may decide.

ARTICLE IV

FUND FOR SPECIAL OPERATIONS

Section 1. **Establishment, Purpose, and Functions**

A Fund for Special Operations is established for the making of loans on terms and conditions appropriate for dealing with special circumstances arising in specific countries or with respect to specific projects.

The Fund, whose administration shall be entrusted to the Bank, shall have the purpose and functions set forth in Article I of this Agreement.

Section 2. **Applicable Provisions**

The Fund shall be governed by the provisions of the present article and all other provisions of this Agreement, excepting those inconsistent with the provisions of the present article and those expressly applying only to the ordinary operations of the Bank.

Section 3. **Resources**

(a) The original members of the Bank shall contribute to the resources of the Fund in accordance with the provisions of this section.

(b) Members of the Organization of American States that join the Bank after the date specified in Article XV, Section 1 (a) shall contribute to the Fund with such quotas, and under such terms, as may be determined by the Bank.

(c) The Fund shall be established with initial resources in the amount of one hundred fifty million dollars ($150,000,000)[1] in terms of United States dollars of the weight and fineness in effect on January 1, 1959, which shall be contributed by the original members of the Bank in accordance with the quotas specified in Annex B.

(d) Payment of the quotas shall be made as follows:

(i) Fifty per cent of its quota shall be paid by each member at any time on or after the date on which this Agreement is signed, and the instrument of acceptance or ratification deposited, on its behalf in accordance with Article XV, Section 1, but not later than September 30, 1960.

(ii) The remaining 50 per cent shall be paid at any time subsequent to one year after the Bank has begun operations, in such amounts and at such times as are determined by the Bank; provided, however, that the total amount of all quotas shall be made due and payable not later than the date fixed for payment of the third installment of the subscriptions to the paid-in capital stock of the Bank.

(iii) The payments required under this section shall be distributed among the members in proportion to their quotas and shall be made one half in gold and/or United States dollars, and one half in the currency of the contributing member.

(e) Each payment of a member in its own currency under the preceding paragraph shall be in such amount as, in the opinion of the Bank, is equivalent to the full value, in terms of United States dollars of the weight and fineness in effect on January 1, 1959, of the portion of the quota being paid. The initial payment shall be in such amount as the member considers appropriate hereunder but shall be subject to such adjustment, to be effected within 60 days of the date on which payment was due, as the Bank shall determine to be necessary to constitute the full dollar value equivalent as provided in this paragraph.

(f) Unless otherwise determined by the Board of Governors by a three-fourths majority of the total voting power of the member countries, the liability of members for payment of any call on the unpaid portion of their subscription quotas to the Fund shall be conditional upon payment of not less than 90 per cent of the total obligations of the members for:

(i) the initial payment and all prior calls on such quota subscriptions to the Fund; and

(ii) any installments due on the paid-in portion of the subscriptions to the capital stock of the Bank.

(g) The resources of the Fund shall be increased through additional contributions by the members when the Board of Governors considers it advisable by a three-fourths majority of the total voting power of the member countries.

[1] On January 28, 1964, the Board of Governors increased the authorized resources of the Fund for Special Operations to two-hundred and twenty-three million, one hundred and fifty-eight thousand dollars ($223,158,000), and on March 31, 1965, the Board increased such authorized resources further to one billion one hundred and twenty-three million, one hundred and fifty-eight thousand dollars ($1,123,158,000).

The provisions of Article II, Section 3 (b), shall apply to such increases, in terms of the proportion between the quota in effect for each member and the total amount of the resources of the Fund contributed by members.

(h) As used in this Agreement, the terms "resources of the Fund" shall be deemed to include the following:

(i) contributions by members pursuant to paragraphs (c) and (g) of this section;

(ii) all funds raised by borrowing to which the commitment stipulated in Article II, Section 4 (a) (ii) is not applicable, i.e., those that are specifically chargeable to the resources of the Fund;

(iii) all funds received in repayment of loans made from the resources mentioned above;

(iv) all income derived from operations using or commiting any of the resources mentioned above; and

(v) any other resources at the disposal of the Fund.

Section 4. **Operations**

(a) The operations of the Fund shall be those financed from its own resources, as defined in Section 3 (h) of the present article.

(b) Loans made with resources of the Fund may be partially or wholly repayable in the currency of the member in whose territory the project being financed will be carried out. The part of the loan not repayable in the currency of the member shall be paid in the currency or currencies in which the loan was made.

Section 5. **Limitation on Liability**

In the operations of the Fund, the financial liability of the Bank shall be limited to the resources and reserves of the Fund, and the liability of members shall be limited to the unpaid portion of their respective quotas that has become due and payable.

Section 6. **Limitation on Disposition of Quotas**

The rights of members of the Bank resulting from their contributions to the Fund may not be transferred or encumbered, and members shall have no right of reimbursement of such contributions except in cases of loss of the status of membership or of termination of the operations of the Fund.

Section 7. **Discharge of Fund Liabilities on Borrowings**

Payments in satisfaction of any liability on borrowings of funds for inclusion in the resources of the Fund shall be charged:

(i) first, against any reserve established for this purpose; and

(ii) then, against any other funds available in the resources of the Fund.

Section 8. **Administration**

(a) Subject to the provisions of this Agreement, the authorities of the Bank shall have full powers to administer the Fund.

(b) There shall be a Vice President of the Bank in charge of the Fund. The Vice President shall participate in the meetings of the Board of Executive Directors of the Bank, without vote, whenever matters relating to the Fund are discussed.

(c) In the operations of the Fund the Bank shall utilize to the fullest extent possible the same personnel, experts, installations, offices, equipment, and services as it uses for its ordinary operations.

(d) The Bank shall publish a separate annual report showing the results of the Fund's financial operations, including profits or losses. At the annual meeting of the Board of Governors there shall be at least one session devoted to consideration of this report. In addition, the Bank shall transmit to the members a quarterly summary of the Fund's operations.

Section 9. **Voting**

(a) In making decisions concerning operations of the Fund, each member country of the Bank shall have the voting power in the Board of Governors accorded to it pursuant to Article VIII, Section 4 (a) and (b), and each Director shall have the voting power in the Board of Executive Directors accorded to him pursuant to Article VIII, Section 4 (a) and (c).

(b) All decisions of the Bank concerning the operations of the Fund shall be adopted by a two-thirds majority of the total voting power of the member countries, unless otherwise provided in this article.

Section 10. **Distribution of Net Profits**

The Board of Governors of the Bank shall determine what portion of the net profits of the Fund shall be distributed among the members after making provision for reserves. Such net profits shall be shared in proportion to the quotas of the members.

Section 11. **Withdrawal of Contributions**

(a) No country may withdraw its contribution and terminate its relations with the Fund while it is still a member of the Bank.

(b) The provisions of Article IX, Section 3, with respect to the settlement of accounts with countries that terminate their membership in the Bank also shall apply to the Fund.

Section 12. **Suspension and Termination**

The provisions of Article X also shall apply to the Fund with substitution of terms relating to the Fund and its resources and respective creditors for those relating to the Bank and its ordinary capital resources and respective creditors.

ARTICLE V

CURRENCIES

Section 1. **Use of Currencies**

(a) The currency of any member held by the Bank, either in its ordinary capital resources or in the resources of the Fund, however acquired, may be used by the Bank and by any recipient from the Bank, without restriction by the member, to make payments for goods and services produced in the territory of such member.

(b) Members may not maintain or impose restrictions of any kind upon the use by the Bank or by any recipient from the Bank, for payments in any country, of the following:

(i) gold and dollars received by the Bank in payment of the 50 per cent portion of each member's subscription to shares of the Bank's capital and of the 50 per cent portion of each member's quota for contribution to the Fund, pursuant to the provisions of Article II and Article IV, respectively;

(ii) currencies of members purchased with the gold and dollar funds referred to in (i) of this paragraph;

(iii) currencies obtained by borrowings, pursuant to the provisions of Article VII, Section 1 (i), for inclusion in the ordinary capital resources of the Bank;

(iv) gold and dollars received by the Bank in payment on account of principal, interest, and other charges, of loans made from the gold and dollar funds referred to in (i) of this paragraph; currencies received in payment of principal, interest, and other charges, of loans made from currencies referred to in (ii) and (iii) of this paragraph; and currencies received in payment of commissions and fees on all guarantees made by the Bank; and

(v) currencies, other than the member's own currency, received from the Bank pursuant to Article VII, Section 4 (c) and Article IV, Section 10, in distribution of net profits.

(c) A member's currency held by the Bank, either in its ordinary capital resources or in the resources of the Fund, not covered by paragraph (b) of this section, also may be used by the Bank or any recipient from the Bank for payments in any country without restriction of any kind, unless the member notifies the Bank of its desire that such currency or a portion thereof be restricted to the uses specified in paragraph (a) of this section.

(d) Members may not place any restrictions on the holding and use by the Bank, for making amortization payments or anticipating payment of, or repurchasing part or all of, the Bank's own obligations, of currencies received by the Bank in repayment of direct loans made from borrowed funds included in the ordinary capital resources of the Bank.

(e) Gold or currency held by the Bank in its ordinary capital resources or in the resources of the Fund shall not be used by the Bank to purchase other currencies unless authorized by a two-thirds majority of the total voting power of the member countries.

Section 2. **Valuation of Currencies**

Whenever it shall become necessary under this Agreement to value any currency in terms of another currency, or in terms of gold, such valuation shall be determined by the Bank after consultation with the International Monetary Fund.

Section 3. **Maintenance of Value of the Currency Holdings of the Bank**

(a) Whenever the par value in the International Monetary Fund of a member's currency is reduced or the foreign exchange value of a member's currency has, in the opinion of the Bank, depreciated to a significant extent, the member shall pay to the Bank within a reasonable time an additional amount of its own currency sufficient to maintain the value of all the currency of the member held by the Bank in its ordinary capital resources, or in the resources of the Fund, excepting currency derived from borrowings by the Bank. The standard of value for this purpose shall be the United States dollar of the weight and fineness in effect on January 1, 1959.

(b) Whenever the par value in the International Monetary Fund of a member's currency is increased or the foreign exchange value of such member's currency has, in the opinion of the Bank, appreciated to a significant extent, the Bank shall return to such member within a reasonable time an amount of that member's currency equal to the increase in the value of the amount of such currency which is held by the Bank in its ordinary capital resources or in the resources of the Fund, excepting currency derived from borrowings by the Bank. The standard of value for this purpose shall be the same as that established in the preceding paragraph.

(c) The provisions of this section may be waived by the Bank when a uniform proportionate change in the par value of the currencies of all the Bank's members is made by the International Monetary Fund.

Section 4. **Methods of Conserving Currencies**

The Bank shall accept from any member promissory notes or similar securities issued by the government of the member, or by the depository designated by such member, in lieu of any part of the currency of the member representing the 50 per cent portion of its subscription to the Bank's authorized capital and the 50 per cent portion of its subscription to the resources of the Fund, which, pursuant to the provisions of Article II and Article IV, respectively, are payable by each member in its national currency, provided such currency is not required by the Bank for the conduct of its operations. Such promissory notes or securities shall be non-negotiable, non-interest-bearing, and payable to the Bank at their par value on demand.

ARTICLE VI

TECHNICAL ASSISTANCE

Section 1. **Provision of Technical Advice and Assistance**

The Bank may, at the request of any member or members, or of private firms that may obtain loans from it, provide technical advice and assistance in its field of activity, particularly on:

(i) the preparation, financing, and execution of development plans and projects, including the consideration of priorities, and the formulation of loan proposals on specific national or regional development projects; and

(ii) the development and advanced training, through seminars and other forms of instruction, of personnel specializing in the formulation and implementation of development plans and projects.

Section 2. **Cooperative Agreements on Technical Assistance**

In order to accomplish the purposes of this article, the Bank may enter into agreements on technical assistance with other national or international institutions, either public or private.

Section 3. **Expenses**

(a) The Bank may arrange with member countries or firms receiving technical assistance, for reimbursement of the expenses of furnishing such assistance on terms which the Bank deems appropriate.

(b) The expenses of providing technical assistance not paid by the recipients shall be met from the net income of the Bank or of the Fund. However, during the first three years of the Bank's operations, up to three per cent, in total, of the initial resources of the Fund may be used to meet such expenses.

ARTICLE VII

MISCELLANEOUS POWERS AND DISTRIBUTION OF PROFITS

Section 1. **Miscellaneous Powers of the Bank**

In addition to the powers specified elsewhere in this Agreement, the Bank shall have the power to:

(i) borrow funds and in that connection to furnish such collateral or other security therefor as the Bank shall determine, provided that, before making a sale of its obligations in the markets of a country, the Bank shall have obtained the approval of that country and of the member in whose currency the obligations are denominated. In addition, in the case of borrowings of funds to be included in the Bank's ordinary capital resources, the Bank shall obtain agreement of such countries that the proceeds may be exchanged for the currency of any other country without restriction;

(ii) buy and sell securities it has issued or guaranteed or in which it has invested, provided that the Bank shall obtain the approval of the country in whose territories the securities are to be bought or sold;

(iii) with the approval of a two-thirds majority of the total voting power of the member countries, invest funds not needed in its operations in such obligations as it may determine;

(iv) guarantee securities in its portfolio for the purpose of facilitating their sale; and

(v) exercise such other powers as shall be necessary or desirable in furtherance of its purpose and functions, consistent with the provisions of this Agreement.

Section 2. **Warning to be Placed on Securities**

Every security issued or guaranteed by the Bank shall bear on its face a conspicuous statement to the effect that it is not an obligation of any government, unless it is in fact the obligation of a particular government, in which case it shall so state.

Section 3. **Methods of Meeting Liabilities of the Bank in Case of Defaults**

(a) The Bank, in the event of actual or threatened default on loans made or guaranteed by the Bank using its ordinary capital resources, shall take such action as it deems appropriate with respect to modifying the terms of the loan, other than the currency of repayment.

(b) The payments in discharge of the Bank's liabilities on borrowings or guarantees under Article III, Section 4 (ii) and (iii) chargeable against the ordinary capital resources of the Bank shall be charged:

(i) first, against the special reserve provided for in Article III, Section 13; and

(ii) then, to the extent necessary and at the discretion of the Bank, against the other reserves, surplus, and funds corresponding to the capital paid in for shares.

(c) Whenever necessary to meet contractual payments of interest, other charges, or amortization on the Bank's borrowings, or to meet the Bank's liabilities with respect to similar payments on loans guaranteed by it chargeable to its ordinary capital resources, the Bank may call upon the members to pay an appropriate amount of their callable capital subscriptions, in accordance with Article II, Section 4 (a) (ii). Moreover, if the Bank believes that a default may be of long duration, it may call an additional part of such subscriptions not to exceed in any one year one per cent of the total subscriptions of the members, for the following purposes:

(i) to redeem prior to maturity, or otherwise discharge its liability on, all or part of the outstanding principal of any loan guaranteed by it in respect of which the debtor is in default; and

(ii) to repurchase, or otherwise discharge its liability on, all or part of its own outstanding obligations.

Section 4. **Distribution of Net Profits and Surplus**

(a) The Board of Governors may determine periodically what part of the net profits and of the surplus shall be distributed. Such distributions may be made only when the reserves have reached a level which the Board of Governors considers adequate.

(b) The distributions referred to in the preceding paragraph shall be made in proportion to the number of shares held by each member.

(c) Payments shall be made in such manner and in such currency or currencies as the Board of Governors shall determine. If such payments are made to a member in currencies other than its own, the transfer of such currencies and their use by the receiving country shall be without restriction by any member.

ARTICLE VIII

ORGANIZATION AND MANAGEMENT

Section 1. **Structure of the Bank**

The Bank shall have a Board of Governors, a Board of Executive Directors, a President, an Executive Vice President, a Vice President in charge of the Fund, and such other officers and staff as may be considered necessary.

Section 2. **Board of Governors**

(a) All the powers of the Bank shall be vested in the Board of Governors. Each member shall appoint one governor and one alternate, who shall serve for five years, subject to termination of appointment at any time, or to reappointment, at the pleasure of the appointing member. No alternate may vote except in the absence of his principal. The Board shall select one of the governors as Chairman, who shall hold office until the next regular meeting of the Board.

(b) The Board of Governors may delegate to the Board of Executive Directors all its powers except power to:

(i) admit new members and determine the conditions of their admission;

(ii) increase or decrease the authorized capital stock of the Bank and contributions to the Fund;

(iii) elect the President of the Bank and determine his remuneration;

(iv) suspend a member, pursuant to Article IX, Section 2;

(v) determine the remuneration of the executive directors and their alternates;

(vi) hear and decide any appeals from interpretations of this Agreement given by the Board of Executive Directors;

(vii) authorize the conclusion of general agreements for cooperation with other international organizations;

(viii) approve, after reviewing the auditors' report, the general balance sheet and the statement of profit and loss of the institution;

(ix) determine the reserves and the distribution of the net profits of the Bank and of the Fund;

(x) select outside auditors to certify to the general balance sheet and the statement of profit and loss of the institution;

(xi) amend this Agreement; and

(xii) decide to terminate the operations of the Bank and to distribute its assets.

(c) The Board of Governors shall retain full power to exercise authority over any matter delegated to the Board of Executive Directors under paragraph (b) above.

(d) The Board of Governors shall, as a general rule, hold a meeting annually. Other meetings may be held when the Board of Governors so provides or when called by the Board of Executive Directors. Meetings of the Board of Governors also shall be called by the Board of Executive Directors whenever requested by five members of the Bank or by members having one fourth of the total voting power of the member countries.

(e) A quorum for any meeting of the Board of Governors shall be an absolute majority of the total number of governors, representing not less than two thirds of the total voting power of the member countries.

(f) The Board of Governors may establish a procedure whereby the Board of Executive Directors, when it deems such action appropriate, may submit a specific question to a vote of the governors without calling a meeting of the Board of Governors.

(g) The Board of Governors, and the Board of Executive Directors to the extent authorized, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank.

(h) Governors and alternates shall serve as such without compensation from the Bank, but the Bank may pay them reasonable expenses incurred in attending meetings of the Board of Governors.

Section 3. **Board of Executive Directors**

(a) The Board of Executive Directors shall be responsible for the conduct of the operations of the Bank, and for this purpose may exercise all the powers delegated to it by the Board of Governors.

(b) There shall be seven executive directors, who shall not be governors, and of whom:

(i) one shall be appointed by the member having the largest number of shares in the Bank;

(ii) six shall be elected by the governors of the remaining members pursuant to the provisions of Annex C of this Agreement.

Executive directors shall be appointed or elected for terms of three years and may be reappointed or re-elected for successive terms. They shall be persons of recognized competence and wide experience in economic and financial matters.

(c) Each executive director shall appoint an alternate who shall have full power to act for him when he is not present. Directors and alternates shall be citizens of the member countries. None of the elected directors and their alternates may be of the same citizenship. Alternates may participate in meetings but may vote only when they are acting in place of their principals.

(d) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than 180 days before the end of his term, a successor shall be elected for the remainder of the term by the governors who elected the former director. An absolute majority of the votes cast shall be required for election. While the office remains vacant, the alternate shall have all the powers of the former director except the power to appoint an alternate.

(e) The Board of Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

(f) A quorum for any meeting of the Board of Executive Directors shall be an absolute majority of the total number of directors representing not less than two thirds of the total voting power of the member countries.

(g) A member of the Bank may send a representative to attend any meeting of the Board of Executive Directors when a matter especially affecting that member is under consideration. Such right of representation shall be regulated by the Board of Governors.

(h) The Board of Executive Directors may appoint such committees as it deems advisable. Membership of such committees need not be limited to governors, directors, or alternates.

(i) The Board of Executive Directors shall determine the basic organization of the Bank, including the number and general responsibilities of the chief administrative and professional positions of the staff, and shall approve the budget of the Bank.

(j) Upon the admission to the Bank of new members, having votes totaling not less than 22,000, the Board of Governors may, by a two-thirds majority of the total number of governors representing not less than three-fourths of the total voting power of the member countries, increase by one the number of Executive Directors to be elected.[1]

Section 4. **Voting**

(a) Each member country shall have 135 votes plus one vote for each share of capital stock of the Bank held by that country.

(b) In voting in the Board of Governors, each governor shall be entitled to cast the votes of the member country which he represents. Except as otherwise specifically provided in this Agreement, all matters before the Board of Governors shall be decided by a majority of the total voting power of the member countries.

[1] This subsection was added by action of the Board of Governors on January 28, 1964.

(c) In voting in the Board of Executive Directors:

(i) the appointed director shall be entitled to cast the number of votes of the member country which appointed him;

(ii) each elected director shall be entitled to cast the number of votes that counted toward his election, which votes shall be cast as a unit; and

(iii) except as otherwise specifically provided in this Agreement, all matters before the Board of Executive Directors shall be decided by a majority of the total voting power of the member countries.

Section 5. **President, Executive Vice President, and Staff**

(a) The Board of Governors, by an absolute majority of the total number of governors representing not less than a majority of the total voting power of the member countries, shall elect a President of the Bank who, while holding office, shall not be a governor or an executive director or alternate for either.

Under the direction of the Board of Executive Directors, the President of the Bank shall conduct the ordinary business of the Bank and shall be chief of its staff. He also shall be the presiding officer at meetings of the Board of Executive Directors, but shall have no vote, except that it shall be his duty to cast a deciding vote when necessary to break a tie.

The President of the Bank shall be the legal representative of the Bank. The term of office of the President of the Bank shall be five years, and he may be reelected to successive terms. He shall cease to hold office when the Board of Governors so decides by a majority of the total voting power of the member countries.

(b) The Executive Vice President shall be appointed by the Board of Executive Directors on the recommendation of the President of the Bank. Under the direction of the Board of Executive Directors and the President of the Bank, the Executive Vice President shall exercise such authority and perform such functions in the administration of the Bank as may be determined by the Board of Executive Directors. In the absence or incapacity of the President of the Bank, the Executive Vice President shall exercise the authority and perform the functions of the President.

The Executive Vice President shall participate in meetings of the Board of Executive Directors but shall have no vote at such meetings, except that he shall cast the deciding vote, as provided in paragraph (a) of this section, when he is acting in place of the President of the Bank.

(c) In addition to the Vice President referred to in Article IV, Section 8 (b), the Board of Executive Directors may, on recommendation of the President of the Bank, appoint other Vice Presidents who shall exercise such authority and perform such functions as the Board of Executive Directors may determine.

(d) The President, officers, and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and shall recognize no other

(c) Each executive director shall appoint an alternate who shall have full power to act for him when he is not present. Directors and alternates shall be citizens of the member countries. None of the elected directors and their alternates may be of the same citizenship. Alternates may participate in meetings but may vote only when they are acting in place of their principals.

(d) Directors shall continue in office until their successors are appointed or elected. If the office of an elected director becomes vacant more than 180 days before the end of his term, a successor shall be elected for the remainder of the term by the governors who elected the former director. An absolute majority of the votes cast shall be required for election. While the office remains vacant, the alternate shall have all the powers of the former director except the power to appoint an alternate.

(e) The Board of Executive Directors shall function in continuous session at the principal office of the Bank and shall meet as often as the business of the Bank may require.

(f) A quorum for any meeting of the Board of Executive Directors shall be an absolute majority of the total number of directors representing not less than two thirds of the total voting power of the member countries.

(g) A member of the Bank may send a representative to attend any meeting of the Board of Executive Directors when a matter especially affecting that member is under consideration. Such right of representation shall be regulated by the Board of Governors.

(h) The Board of Executive Directors may appoint such committees as it deems advisable. Membership of such committees need not be limited to governors, directors, or alternates.

(i) The Board of Executive Directors shall determine the basic organization of the Bank, including the number and general responsibilities of the chief administrative and professional positions of the staff, and shall approve the budget of the Bank.

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[1] This subsection was added by action of the Board of Governors on January 28, 1964.

(c) In voting in the Board of Executive Directors:

(i) the appointed director shall be entitled to cast the number of votes of the member country which appointed him;

(ii) each elected director shall be entitled to cast the number of votes that counted toward his election, which votes shall be cast as a unit; and

(iii) except as otherwise specifically provided in this Agreement, all matters before the Board of Executive Directors shall be decided by a majority of the total voting power of the member countries.

Section 5. **President, Executive Vice President, and Staff**

(a) The Board of Governors, by an absolute majority of the total number of governors representing not less than a majority of the total voting power of the member countries, shall elect a President of the Bank who, while holding office, shall not be a governor or an executive director or alternate for either.

Under the direction of the Board of Executive Directors, the President of the Bank shall conduct the ordinary business of the Bank and shall be chief of its staff. He also shall be the presiding officer at meetings of the Board of Executive Directors, but shall have no vote, except that it shall be his duty to cast a deciding vote when necessary to break a tie.

The President of the Bank shall be the legal representative of the Bank. The term of office of the President of the Bank shall be five years, and he may be reelected to successive terms. He shall cease to hold office when the Board of Governors so decides by a majority of the total voting power of the member countries.

(b) The Executive Vice President shall be appointed by the Board of Executive Directors on the recommendation of the President of the Bank. Under the direction of the Board of Executive Directors and the President of the Bank, the Executive Vice President shall exercise such authority and perform such functions in the administration of the Bank as may be determined by the Board of Executive Directors. In the absence or incapacity of the President of the Bank, the Executive Vice President shall exercise the authority and perform the functions of the President.

The Executive Vice President shall participate in meetings of the Board of Executive Directors but shall have no vote at such meetings, except that he shall cast the deciding vote, as provided in paragraph (a) of this section, when he is acting in place of the President of the Bank.

(c) In addition to the Vice President referred to in Article IV, Section 8 (b), the Board of Executive Directors may, on recommendation of the President of the Bank, appoint other Vice Presidents who shall exercise such authority and perform such functions as the Board of Executive Directors may determine.

(d) The President, officers, and staff of the Bank, in the discharge of their offices, owe their duty entirely to the Bank and shall recognize no other

authority. Each member of the Bank shall respect the international character of this duty.

(e) The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

(f) The Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article I.

Section 6. **Publication of Reports and Provision of Information**

(a) The Bank shall publish an annual report containing an audited statement of the accounts. It shall also transmit quarterly to the members a summary statement of the financial position and a profit-and-loss statement showing the results of its ordinary operations.

(b) The Bank may also publish such other reports as it deems desirable to carry out its purpose and functions.

ARTICLE IX

WITHDRAWAL AND SUSPENSION OF MEMBERS

Section 1. **Right to Withdraw**

Any member may withdraw from the Bank by delivering to the Bank at its principal office written notice of its intention to do so. Such withdrawal shall become finally effective on the date specified in the notice but in no event less than six months after the notice is delivered to the Bank. However, at any time before the withdrawal becomes finally effective, the member may notify the Bank in writing of the cancellation of its notice of intention to withdraw.

After withdrawing, a member shall remain liable for all direct and contingent obligations to the Bank to which it was subject at the date of delivery of the withdrawal notice, including those specified in Section 3 of this article. However, if the withdrawal becomes finally effective, the member shall not incur any liability for obligations resulting from operations of the Bank effected after the date on which the withdrawal notice was received by the Bank.

Section 2. **Suspension of Membership**

If a member fails to fulfill any of its obligations to the Bank, the Bank may suspend its membership by decision of the Board of Governors by a two-thirds majority of the total number of governors representing not less than three fourths of the total voting power of the member countries.

The member so suspended shall automatically cease to be a member of the Bank one year from the date of its suspension unless the Board of Governors decides by the same majority to terminate the suspension.

While under suspension, a member shall not be entitled to exercise any rights under this Agreement, except the right of withdrawal, but shall remain subject to all its obligations.

Section 3. **Settlement of Accounts**

(a) After a country ceases to be a member, it no longer shall share in the profits or losses of the Bank, nor shall it incur any liability with respect to loans and guarantees entered into by the Bank thereafter. However, it shall remain liable for all amounts it owes the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted by the Bank before the date on which the country ceased to be a member remains outstanding.

(b) When a country ceases to be a member, the Bank shall arrange for the repurchase of such country's capital stock as a part of the settlement of accounts pursuant to the provisions of this section; but the country shall have no other rights under this Agreement except as provided in this section and in Article XIII, Section 2.

(c) The Bank and the country ceasing to be a member may agree on the repurchase of the capital stock on such terms as are deemed appropriate in the circumstances, without regard to the provisions of the following paragraph. Such agreement may provide, among other things, for a final settlement of all obligations of the country to the Bank.

(d) If the agreement referred to in the preceding paragraph has not been consummated within six months after the country ceases to be a member or such other time as the Bank and such country may agree upon, the repurchase price of such country's capital stock shall be its book value, according to the books of the Bank, on the date when the country ceased to be a member. Such repurchase shall be subject to the following conditions:

(i) As a prerequisite for payment, the country ceasing to be a member shall surrender its stock certificates, and such payment may be made in such installments, at such times and in such available currencies as the Bank determines, taking into account the financial position of the Bank.

(ii) Any amount which the Bank owes the country for the repurchase of its capital stock shall be withheld to the extent that the country or any of its subdivisions or agencies remains liable to the Bank as a result of loan or guarantee operations. The amount withheld may, at the option of the Bank, be applied on any such liability as it matures. However, no amount shall be withheld on account of the country's contingent liability for future calls on its subscription pursuant to Article II, Section 4 (a) (ii).

(iii) If the Bank sustains net losses on any loans or participations, or as a result of any guarantees, outstanding on the date the country ceased to be a member, and the amount of such losses exceeds the amount of the reserves provided therefor on such date, such country shall repay on demand the amount by which the repurchase price of its shares would have been reduced, if the losses had been taken into account when the book value of the shares, according to the books of the Bank, was determined. In addition, the former member shall remain liable on any call pursuant to Article II, Section 4 (a) (ii), to the extent that it would have been required to respond if the impairment of capital had occurred and the call had been made at the time the repurchase price of its shares had been determined.

(c) In no event shall any amount due to a country for its shares under this section be paid until six months after the date upon which the country ceases to be a member. If within that period the Bank terminates operations all rights of such country shall be determined by the provisions of Article X, and such country shall be considered still a member of the Bank for the purposes of such article except that it shall have no voting rights.

ARTICLE X

SUSPENSION AND TERMINATION OF OPERATIONS

Section 1. **Suspension of Operations**

In an emergency the Board of Executive Directors may suspend operations in respect of new loans and guarantees until such time as the Board of Governors may have an opportunity to consider the situation and take pertinent measures.

Section 2. **Termination of Operations**

The Bank may terminate its operations by a decision of the Board of Governors by a two-thirds majority of the total number of governors representing not less than three fourths of the total voting power of the member countries. After such termination of operations the Bank shall forthwith cease all activities, except those incident to the conservation, preservation, and realization of its assets and settlement of its obligations.

Section 3. **Liability of Members and Payment of Claims**

(a) The liability of all members arising from the subscriptions to the capital stock of the Bank and in respect to the depreciation of their currencies shall continue until all direct and contingent obligations shall have been discharged.

(b) All creditors holding direct claims shall be paid out of the assets of the Bank and then out of payments to the Bank on unpaid or callable subscriptions. Before making any payments to creditors holding direct claims, the

Board of Executive Directors shall make such arrangements as are necessary, in its judgment, to ensure a pro rata distribution among holders of direct and contingent claims.

Section 4. **Distribution of Assets**

(a) No distribution of assets shall be made to members on account of their subscriptions to the capital stock of the Bank until all liabilities to creditors shall have been discharged or provided for. Moreover, such distribution must be approved by a decision of the Board of Governors by a two-thirds majority of the total number of governors representing not less than three fourths of the total voting power of the member countries.

(b) Any distribution of the assets of the Bank to the members shall be in proportion to capital stock held by each member and shall be effected at such times and under such conditions as the Bank shall deem fair and equitable. The shares of assets distributed need not be uniform as to type of assets. No member shall be entitled to receive its share in such a distribution of assets until it has settled all of its obligations to the Bank.

(c) Any member receiving assets distributed pursuant to this article shall enjoy the same rights with respect to such assets as the Bank enjoyed prior to their distribution.

ARTICLE XI

STATUS, IMMUNITIES AND PRIVILEGES

Section 1. **Scope of Article**

To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be accorded to the Bank in the territories of each member.

Section 2. **Legal Status**

The Bank shall possess juridical personality and, in particular, full capacity:

(a) to contract;

(b) to acquire and dispose of immovable and movable property; and

(c) to institute legal proceedings.

Section 3. **Judicial Proceedings**

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, member countries shall have recourse to such special procedures to settle controversies between the Bank and

its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank or in contracts entered into with the Bank.

Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

Section 4. **Immunity of Assets**

Property and assets of the Bank, wheresoever located and by whomsoever held, shall be considered public international property and shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

Section 5. **Inviolability of Archives**

The archives of the Bank shall be inviolable.

Section 6. **Freedom of Assets from Restrictions**

To the extent necessary to carry out the purpose and functions of the Bank and to conduct its operations in accordance with this Agreement, all property and other assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature, except as may otherwise be provided in this Agreement.

Section 7. **Privilege for Communications**

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

Section 8. **Personal Immunities and Privileges**

All governors, executive directors, alternates, officers and employees of the Bank shall have the following privileges and immunities:

(a) Immunity from legal process with respect to acts performed by them in their official capacity, except when the Bank waives this immunity.

(b) When not local nationals, the same immunities from immigration restrictions, alien registration requirements and national service obligations and the same facilities as regards exchange provisions as are accorded by members to the representatives, officials, and employees of comparable rank of other members.

(c) The same privileges in respect of traveling facilities as are accorded by members to representatives, officials, and employees of comparable rank of other members.

Section 9. **Immunities from Taxation**

(a) The Bank, its property, other assets, income, and the operations and transactions it carries out pursuant to this Agreement, shall be immune from all taxation and from all customs duties. The Bank shall also be immune from

any obligation relating to the payment, withholding or collection of any tax, or duty.

(b) No tax shall be levied on or in respect of salaries and emoluments paid by the Bank to executive directors, alternates, officials or employees of the Bank who are not local citizens or other local nationals.

(c) No tax of any kind shall be levied on any obligation or security issued by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is issued by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the Bank.

(d) No tax of any kind shall be levied on any obligation or security guaranteed by the Bank, including any dividend or interest thereon, by whomsoever held:

(i) which discriminates against such obligation or security solely because it is guaranteed by the Bank; or

(ii) if the sole jurisdictional basis for such taxation is the location of any office or place of business maintained by the Bank.

Section 10. **Implementation**

Each member, in accordance with its juridical system, shall take such action as is necessary to make effective in its own territories the principles set forth in this article, and shall inform the Bank of the action which it has taken on the matter.

ARTICLE XII

AMENDMENTS

(a) This Agreement may be amended only by decision of the Board of Governors by a two-thirds majority of the total number of governors representing not less than three fourths of the total voting power of the member countries.

(b) Notwithstanding the provisions of the preceding paragraph, the unanimous agreement of the Board of Governors shall be required for the approval of any amendment modifying:

(i) the right to withdraw from the Bank as provided in Article IX, Section 1;

(ii) the right to purchase capital stock of the Bank and to contribute to the Fund as provided in Article II, Section 3 (b) and in Article IV, Section 3 (g), respectively; and

(iii) the limitation on liability as provided in Article II, Section 3 (d) and Article IV, Section 5.

(c) Any proposal to amend this Agreement, whether emanating from a member or the Board of Executive Directors, shall be communicated to the Chairman of the Board of Governors, who shall bring the proposal before the Board of Governors. When an amendment has been adopted, the Bank shall so certify in an official communication addressed to all members. Amendments shall enter into force for all members three months after the date of the official communication unless the Board of Governors shall specify a different period.

ARTICLE XIII

INTERPRETATION AND ARBITRATION

Section 1. **Interpretation**

(a) Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Board of Executive Directors for decision.

Members especially affected by the question under consideration shall be entitled to direct representation before the Board of Executive Dirctors as provided in Article VIII, Section 3 (g).

(b) In any case where the Board of Executive Directors has given a decision under (a) above, any member may require that the question be submitted to the Board of Governors, whose decision shall be final. Pending the decision of the Board of Governors, the Bank may, so far as it deems it necessary, act on the basis of the decision of the Board of Executive Directors.

Section 2. **Arbitration**

If a disagreement should arise between the Bank and a country which has ceased to be a member, or between the Bank and any member after adoption of a decision to terminate the operation of the Bank, such disagreement shall be submitted to arbitration by a tribunal of three arbitrators. One of the arbitrators shall be appointed by the Bank, another by the country concerned, and the third, unless the parties otherwise agree, by the Secretary General of the Organization of American States. If all efforts to reach a unanimous agreement fail, decisions shall be made by a majority vote of the three arbitrators.

The third arbitrator shall be empowered to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.

ARTICLE XIV

GENERAL PROVISIONS

Section 1. **Principal Office**

The principal office of the Bank shall be located in Washington, District of Columbia, United States of America.

Section 2. **Relations with other Organizations**

The Bank may enter into arrangements with other organizations with respect to the exchange of information or for other purposes consistent with this Agreement.

Section 3. **Channel of Communication**

Each member shall designate an official entity for purposes of communication with the Bank on matters connected with this Agreement.

Section 4. **Depositories**

Each member shall designate its central bank as a depository in which the Bank may keep its holdings of such member's currency and other assets of the Bank. If a member has no central bank, it shall, in agreement with the Bank, designate another institution for such purpose.

ARTICLE XV

FINAL PROVISIONS

Section 1. **Signature and Acceptance**

(a) This Agreement shall be deposited with the General Secretariat of the Organization of American States, where it shall remain open until December 31, 1959, for signature by the representatives of the countries listed in Annex A. Each signatory country shall deposit with the General Secretariat of the Organization of American States an instrument setting forth that it has accepted or ratified this Agreement in accordance with its own laws and has taken the steps necessary to enable it to fulfill all of its obligations under this Agreement.

(b) The General Secretariat of the Organization of American States shall send certified copies of this Agreement to the members of the Organization and duly notify them of each signature and deposit of the instrument of acceptance or ratification made pursuant to the foregoing paragraph, as well as the date thereof.

(c) At the time the instrument of acceptance or ratification is deposited on its behalf, each country shall deliver to the General Secretariat of the Organization of American States, for the purpose of meeting administrative expenses of the Bank, gold or United States dollars equivalent to one tenth of one per cent of the purchase price of the shares of the Bank subscribed by it and of its quota in the Fund. This payment shall be credited to the member on account of its subscription and quota prescribed pursuant to Articles II, Section 4 (a) (i), and IV, Section 3 (d) (i). At any time on or after the date on which its instrument of acceptance or ratification is deposited, any member may make additional payments to be credited to the member on account of its subscription and quota prescribed pursuant to Articles II and IV. The General Secretariat of the Organization of American States shall hold all funds paid under this paragraph in a special deposit account or accounts and shall make such funds available to the Bank not later than the time of the first

meeting of the Board of Governors held pursuant to Section 3 of this article. If this Agreement has not come into force by December 31, 1959, the General Secretariat of the Organization of American States shall return such funds to the countries that delivered them.

(d) On or after the date on which the Bank commences operations, the General Secretariat of the Organization of American States may receive the signature and the instrument of acceptance or ratification of this Agreement from any country whose membership has been approved in accordance with Article II, Section 1(b).

Section 2. **Entry into Force**

(a) This Agreement shall enter into force when it has been signed and instruments of acceptance or ratification have been deposited, in accordance with Section 1 (a) of this article, by representatives of countries whose subscriptions comprise not less than 85 per cent of the total subscriptions set forth in Annex A.

(b) Countries whose instruments of acceptance or ratification were deposited prior to the date on which the agreement entered into force shall become members on that date. Other countries shall become members on the dates on which their instruments of acceptance or ratification are deposited.

Section 3. **Commencement of Operations**

(a) The Secretary General of the Organization of American States shall call the first meeting of the Board of Governors as soon as this Agreement enters into force under Section 2 of this article.

(b) At the first meeting of the Board of Governors arrangements shall be made for the selection of the executive directors and their alternates in accordance with the provisions of Article VIII, Section 3, and for the determination of the date on which the Bank shall commence operations. Notwithstanding the provisions of Article VIII, Section 3, the governors, if they deem it desirable, may provide that the first term to be served by such directors may be less than three years.

DONE at the city of Washington, District of Columbia, United States of America, in a single original, dated April 8, 1959, whose English, French, Portuguese, and Spanish texts are equally authentic.

ANNEXES

ANNEX A

SUBSCRIPTIONS TO AUTHORIZED CAPITAL STOCK OF THE BANK

(In shares of US$10,000 each)

Country	Paid-in Capital Shares	Callable Shares	Total Subscription
Argentina	5,157	5,157	10,314
Bolivia	414	414	828
Brazil	5,157	5,157	10,314
Chile	1,416	1,416	2,832
Colombia	1,415	1,415	2,830
Costa Rica	207	207	414
Cuba	1,842	1,842	3,684
Dominican Republic	276	276	552
Ecuador	276	276	552
El Salvador	207	207	414
Guatemala	276	276	552
Haiti	207	207	414
Honduras	207	207	414
Mexico	3,315	3,315	6,630
Nicaragua	207	207	414
Panama	207	207	414
Paraguay	207	207	414
Peru	691	691	1,382
United States of America	15,000	20,000	35,000
Uruguay	553	553	1,106
Venezuela	2,763	2,763	5,526
Total	40,000	45,000	85,000

ADDENDUM

AUTHORIZED CAPITAL STOCK OF THE BANK

As of January 28, 1964

(In shares of US$10,000 each)

Country	Paid-in Capital Shares	Callable Shares	Total
Argentina	5,157	17,291	22,448
Bolivia	414	1,388	1,802
Brazil	5,157	17,291	22,448
Chile	1,416	4,748	6,164
Colombia	1,415	4,744	6,159
Costa Rica	207	694	901
Dominican Republic	276	926	1,202
Ecuador	276	926	1,202
El Salvador	207	694	901
Guatemala	276	926	1,202
Haiti	207	694	901
Honduras	207	694	901
Mexico	3,315	11,115	14,430
Nicaragua	207	694	901
Panama	207	694	901
Paraguay	207	694	901
Peru	691	2,317	3,008
United States of America	15,000	61,176	76,176
Uruguay	553	1,854	2,407
Venezuela	2,763	9,264	12,027
Unassigned[1]	9,342	28,676	38,018
Total	47,500	167,500	215,000

[1] Available for subscription by present or by future members.

ANNEX B

CONTRIBUTION QUOTAS FOR THE FUND FOR SPECIAL OPERATIONS

(In thousands of US$)

Country	Quota
Argentina	10,314
Bolivia	828
Brazil	10,314
Chile	2,832
Colombia	2,830
Costa Rica	414
Cuba	3,684
Dominican Republic	552
Ecuador	552
El Salvador	414
Guatemala	552
Haiti	414
Honduras	414
Mexico	6,630
Nicaragua	414
Panama	414
Paraguay	414
Peru	1,382
United States of America	100,000
Uruguay	1,106
Venezuela	5,526
Total	150,000

ADDENDUM

CONTRIBUTION QUOTAS FOR THE FUND FOR SPECIAL OPERATIONS

As of March 31, 1965

(In thousands of US$)

Country	Quota
Argentina	48,873
Bolivia	3,924
Brazil	48,873
Chile	13,419
Colombia	13,410
Costa Rica	1,962
Dominican Republic	2,616
Ecuador	2,616
El Salvador	1,962
Guatemala	2,616
Haiti	1,962
Honduras	1,962
Mexico	31,419
Nicaragua	1,962
Panama	1,962
Paraguay	1,962
Peru	6,546
United States of America	900,000
Uruguay	5,241
Venezuela	26,187
Unassigned	3,684
Total	1,123,158

ANNEX C

ELECTION OF EXECUTIVE DIRECTORS

(a) The six executive directors referred to in Article VIII, Section 3 (b) (ii) shall be elected by the governors eligible to vote for that purpose.

(b) Each governor shall cast in favor of a single person all the votes to which the member he represents is entitled under Article VIII, Section 4.

(c) In the first place, as many ballots as are necessary shall be taken until each of four candidates receives a number of votes that represents a percentage not less than the sum of the percentages appertaining to the country with the greatest voting power and to the country with the least voting power. For the purposes of this paragraph, the total voting power of the countries entitled to participate in the voting provided for under this annex shall be counted as 100 per cent.

(d) In the second place, governors whose votes have not been cast in favor of any of the directors elected under paragraph (c) of this annex shall elect the other two directors on the basis of one vote for each governor. The two candidates who each receive a greater number of votes than any other candidate, on the same ballot, shall be elected executive directors, and the balloting shall be repeated until this occurs. After the balloting has been completed, each governor who did not vote for either of the candidates elected shall assign his vote to one of them.

The number of votes under Article VIII, Section 4, of each governor who has voted for or assigned his vote to a candidate elected hereunder shall be deemed for the purposes of Article VIII, Section 4 (c) (ii) to have counted toward the election of such candidate.

(e) Whenever the Board of Governors increases the number of Executive Directors in accordance with Article VIII, Section 3 (j), the additional Executive Director shall be elected at the next regular election of Executive Directors in accordance with sub-paragraph (c) of this Annex.[1]

[1] This subsection was added by action of the Board of Governors on January 28, 1964.

Appendix II

CONTRACT OF LOAN

between the

INTER-AMERICAN DEVELOPMENT BANK

and

LUTCHER S.A. CELULOSE E PAPEL

CONTRACT OF LOAN

CONTRACT entered into the 14th day of June, 1961 between the Inter-American Development Bank (hereinafter called "the Bank") and Lutcher S.A. Celulose E Papel, a Brazilian corporation having its legal domicile in Sao Paulo, Brazil (hereinafter called "the Borrower").

ARTICLE I

The Loan and its Purpose

Section 1.01. Subject to the terms and conditions set forth in this Contract, the Bank agrees to lend to the Borrower up to the equivalent of four million seven hundred thousand United States dollars ($4,700,000) or its equivalent in other currencies, of which a maximum of two million five hundred thousand dollars ($2,500,000) is to be disbursed in dollars and in currencies of other countries (except Brazil) which are members of the Bank and up to the equivalent of two million two hundred thousand dollars ($2,200,000) is to be disbursed in cruzeiros. The amounts disbursed hereunder shall be hereinafter called the "Loan."

Section 1.02. The Loan shall be used for the financing of a project, more fully described in Exhibit I hereto (which is to be considered an integral part of this Contract), for the construction of a cellulose pulp mill and related facilities near the City of Guarapuava in the State of Parana, Brazil (hereinafter referred to as the "Project").

Article II

Amortization, Interest and Currency

Section 2.01. (a) The Borrower shall repay the Loan in sixteen (16) consecutive semi-annual installments which shall be payable on the dates set forth in Exhibit II hereto. Each installment shall consist of the following: (i) Amounts of United States dollars and of each of the currencies (other than cruzeiros) disbursed by the Bank, equivalent to the Percentage (set forth after the respective date in Exhibit II) of the total dollars and such other currency disbursed hereunder; (ii) an amount of cruzeiros equal to the total of said Percentage of each of the disbursements of cruzeiros hereunder.

(b) In addition, on each of the dates set forth in Exhibit II, the Borrower shall pay to the Bank an amount of cruzeiros which, when added to those paid under (a) (ii) above, shall result in a total cruzeiro payment equivalent, at the rate of exchange in Brazil calculated in accordance with Section 2.09, to said Percentage of the total dollar equivalent of cruzeiros disbursed hereunder (calculated in accordance with Section 3.03(b)).

Section 2.02. The Borrower shall pay interest at the rate of five and three quarters percent (5¾%) per annum on the principal amount of the Loan outstanding. Such interest shall be payable in currencies corresponding to the principal amount of the various currencies outstanding.

Section 2.03. The Borrower shall pay a commitment fee of three quarters of one percent (¾ of 1%) per annum upon the undisbursed portions of the Loan. Such fees shall be payable proportionately in the currencies undisbursed and shall accrue commencing 60 days after the date of signature of this Contract until the date on which the respective currencies shall have been disbursed, or shall have been cancelled in accordance with Section 2.10 or 4.01 of this Contract.

Section 2.04. All amounts due for interest and commitment charge shall be payable on the 15th day of December and the 15th day of June of each year beginning December 15, 1961. In all cases in which it shall be necessary to compute the amount of interest or commitment fee which shall have accrued for less than a six-month period, such computation shall be made on a daily basis using a 365-day factor.

Section 2.05. The principal of and interest and other charges on the Loan shall be paid by the Borrower at the principal office of the Bank in Washington, D. C., or at such other place or places as the Bank shall reasonably request.

Section 2.06. All payments made in accordance with this Contract shall be applied first to the payment of accrued interest, then to the payment of accrued commitment fees, and lastly to the repayment of the Loan.

Section 2.07. The Borrower shall have the right, upon payment of all accrued interest and charges, and upon not less than sixty (60) days notice to the Bank, to repay in advance of maturity all or any part of the Loan at any time outstanding. Any such prepayment shall be credited to the remaining installments of principal in the inverse order of their maturity or as the Bank shall otherwise permit.

Section 2.08. (a) The amount of the Loan shall be denominated in the various currencies actually lent.

(b) In order to determine the equivalent in dollars of any part of the Loan disbursed in another currency, the value of such currency for purposes of Section 1.01 shall be as determined by the Bank, within that which may be reasonable.

Section 2.09. (a) The obligations to pay interest and commitment fees shall be computed and stated in United States dollars. Each such obligation payable in cruzeiros shall be discharged by the payment of an amount of

cruzeiros equivalent to the dollar obligation against which such payment is made, such amount of cruzeiros to be computed on the basis of the applicable rate of exchange on the due date.

(b) If any payment of amortization, interest or commitment fee is made after the date on which it is due, the Bank may require that it be made on the basis of the applicable rate of exchange on the date of payment.

(c) The applicable rate of exchange for the conversion of cruzeiros into dollars on any given date shall be the rate of exchange at which the dollar is sold on that day in exchange for cruzeiros to persons or enterprises in Brazil, exclusive of government entities, for effecting: (i) The payment of interest and repayment of principal in cases of loans; (ii) the transfer of dividends and other forms of earnings on capital investments in Brazil, and (iii) the transfer of investment capital. If there is no such single rate of exchange applicable to all of the three categories of transactions referred to in the preceding sentence, the applicable rate of exchange on any particular date shall be the highest (i.e., the largest number of cruzeiros per dollar) effective rate of exchange.

(d) If on any date on which a payment is due, the foregoing rule cannot be applied because of the impossibility of determining the effective rate of exchange for the aforementioned transactions, the payment shall be made on the basis of the most recent rate of exchange applicable within thirty days prior to the due date.

(e) If on applying the aforementioned rules a rate of exchange cannot be determined, or if there exist differences with regard to the rate, then the rate of exchange shall be as determined by the Bank.

(f) If, upon application of the aforementioned rules, the Bank determines that the amount of any payment made by the Borrower is insufficient under the Contract, such pay-

ment shall be applied first to interest and commitment fee due and then to principal outstanding. In such cases, the Bank shall so inform the Borrower within thirty (30) days after receipt of the payment, and the Borrower shall pay the amount remaining within thirty (30) days after receipt of such advice. Failure to effect such payment shall be regarded as an Event of Default for purposes of Section 4.01. If, on the other hand, the amount received shall be greater than that due, the Bank and the Borrower shall agree on the application of any such excess.

Section 2.10. The Borrower may, by notice to the Bank, cancel any amount of the Loan which shall not have been disbursed prior to the receipt of such notice. Such cancellation shall not affect any amount which the Bank shall have previously agreed irrevocably to disburse.

Article III

Conditions Precedent, Methods of Disbursement and Termination

Section 3.01. The Bank shall not be obligated to make the first disbursement under the Loan until the following requirements have been complied with to its entire satisfaction:

(a) The Bank shall have received a legal opinion or opinions, in form and substance satisfactory to it, of counsel acceptable to it: (1) as to the due formation, existence and good standing of the Borrower and its corporate power to own property and to carry on the business referred to in its charter; (2) as to the due authorization, execution and delivery by the Borrower of this Contract, and the legality, validity and enforceability as against the Borrower of this Contract in accordance with its terms; (3) as to the due authorization, execution and delivery of the mortgages referred to hereinafter in subsection (c) of this Section 3.01, the legality, validity and enforceability thereof in accordance with their terms, and the creation of the lien

therein purported to be created upon the interest of the Borrower in the mortgaged premises; (4) as to the title of the Borrower to the property to be subjected to the lien of the mortgages hereinafter referred to, and as to the existence of any liens, charges or encumbrances thereon; and (5) as to such other matters incident to the transactions herein contemplated as the Bank may reasonably request.

(b) The Bank shall have received satisfactory evidence of the authority of the person or persons who have signed this Contract on behalf of the Borrower and who will act as representatives of the Borrower in connection with the operation of this Contract, together with certified copies in duplicate of the authorized specimen signatures of such persons.

(c) The Borrower shall have effected the conveyance to it of all the real property in the State of Parana which is described in Exhibit III hereto, and there shall have been delivered to the Bank a first mortgage or mortgages on such property, together with all buildings and improvements, including machinery and equipment, thereon or to be included in the Project, and such mortgages shall have been duly registered.

(d) The Bank and the Borrower shall have entered into a satisfactory arrangement with respect to the pledge of all of the outstanding stock of Ernesto Kirchner S.A. as collateral security for the compliance by the Borrower of all of its obligations contained in this Contract.

Section 3.02. Every disbursement, including the first, shall be subject to prior compliance with the following requirements:

(a) The Borrower shall have presented to the Bank an application for disbursement and shall have furnished to the Bank such documents and other evidence in support of such application as the Bank shall reasonably require.

Such application, documents and other evidence must be sufficient to satisfy the Bank that the Borrower is entitled to the amount applied for and that such amount is to be used only for the purposes specified in this Contract.

(b) There shall not have occurred any of the events described in Section 4.01, and the Borrower shall have delivered to the Bank a certificate to that effect signed by an authorized representative of the Borrower and dated as of the date of the respective disbursement.

Section 3.03. (a) Subject to the terms and conditions herein set forth, the Bank may in its discretion make disbursements of the Loan (i) by reimbursing the Borrower for the reasonable cost of goods and services to be financed under this Contract; (ii) through reimbursement of other banking institutions, for payments made by them, through letters of credit or otherwise, to the Borrower or a designee of the Borrower (any bank charges to be for the account of the Borrower), and (iii) through such other means and by such other procedures as the parties shall mutually agree upon in writing. Payments made by the Bank to any such banking institution pursuant to any such undertaking shall bear interest from the date on which the institution makes a disbursement to the Borrower's designee or from the date on which the Bank makes payment to such institution relative to such disbursement, whichever is earlier.

(b) At the time of each disbursement of cruzeiros in accordance with this contract, the Bank shall advise the Borrower of the dollar equivalent thereof, applying the then current free market rate of exchange in Brazil, calculated in accordance with Section 2.09.

Section 3.04. Disbursement of the sums referred to in Section 1.01 shall only be made on or before two years from the date of this contract, or such later date as the Bank shall permit in writing. Following such date, the right of

the Borrower to receive any part of such sums that shall not have been disbursed shall be terminated.

Article IV

Events of Default

Section 4.01. The occurrence of any of the following events shall entitle the Bank at its option and by notice to the Borrower to decline to make further disbursements:

(a) A default in the payment of principal or interest or any payment required under this Contract;

(b) A default on the part of the Borrower in the execution or observance of any clause or condition of this Contract;

(c) Discovery by the Bank that a written representation made by the Borrower to the Bank in obtaining the Loan or pursuant to this Contract is incorrect in a material respect;

(d) An extraordinary situation which the Bank determines makes it improbable that the Borrower will be able to perform its obligations under this Contract or that the Loan will fulfill the purpose for which it was made;

(e) Action taken by any governmental entity resulting in the dissolution or liquidation of the Borrower, or that would prevent the Borrower from realizing its objectives entirely, or a substantial part thereof;

(f) An event whereunder the Borrower shall have (i) voluntarily or involuntarily become the subject of proceedings under any bankruptcy or insolvency law, or other law or procedure for the relief of financially distressed debtors, (ii) been unable, or admitted in writing its inability, to pay its debts as they mature, or (iii) taken or suffered any action for its reorganization, liquidation or dissolution; or

(g) The occurrence of a default with respect to any proven indebtedness of the Borrower or under any loan contract of the Borrower, and the continuance of such default for more than any applicable period of grace.

Section 4.02. Upon the occurrence of any of the events referred to in subsections (a), (b), (e), (f) or (g) of Section 4.01 and the continuance thereof for a period of fifteen (15) days, or in the event of the occurrence of any other event specified above and the continuance thereof for a period of thirty (30) days after the Bank gives notice thereof to the Borrower, the Bank, at its option, may declare all or any part of the unpaid principal of the Loan, and any accrued interest and charges, to be due and payable immediately, and upon any such declaration such principal interest and charges shall become due and payable immediately.

Section 4.03. Notwithstanding the provisions of Sections 4.01 and 4.02, no cancellation or suspension pursuant to this Article shall apply to (a) any amount subject to any irrevocable guarantee by the Bank of a letter of credit, except as shall be expressly provided in such guarantee, or (b) amounts on account of purchases made prior to the date of suspension which were authorized by the Bank with respect to which binding orders had previously been placed.

Section 4.04. Any delay in exercising or omission to exercise any right accruing to the Bank under this Contract shall not be construed as an acquiescence or as a waiver by the Bank of any such right.

Section 4.05. Notwithstanding any cancellation or suspension pursuant to this Article, all the provisions of this Contract shall continue in full force and effect as is in this Article specifically provided.

Article V

Execution of the Project

Section 5.01. (a) The Borrower shall cause the Project to be carried out with due diligence and efficiency, in conformity with sound techniques and engineering practices and in conformity with plans and specifications which shall have been submitted to the Bank. Within the permissible borrowing limitations set forth in this Contract, the Borrower agrees to provide all resources required in addition to this Loan for the purpose of completing the Project expeditiously.

(b) All material modifications of the plans and specifications for the Project and any material change (i) in the contract or contracts for engineering services to be financed hereunder, or (ii) in the acquisition program referred to above, must be mutually agreed to in writing by the Bank and the Borrower.

Section 5.02. (a) All procurement of goods to complete the Project shall be made at reasonable cost, which, unless the Bank shall otherwise agree, shall be the approximate lowest available competitive price, taking into consideration all relevant factors. With respect to purchases of goods in countries which are members of the Bank, the Borrower shall use reasonable efforts to purchase goods with the currencies of such countries.

(b) Disbursements to be made under this Contract shall only be made on account of expenditures in the territories of countries which are members of the Bank, or of the International Monetary Fund or Switzerland for goods or services originating in such territories.

(c) All goods and services financed with the proceeds of the Loan shall be used exclusively for the purposes described in this Contract. The written authorization of the Bank shall be required for the disposition of such goods and services for any other purpose.

(d) The Borrower shall insure or cause to be insured the items financed with the proceeds of the Loan against risks incident to their purchase and transit to the point of their use in the Project. Such insurance shall be consistent with sound commercial practice and shall be payable in the currency in which the cost of the goods insured shall be payable.

(e) The Borrower shall keep its properties and business insured with reputable insurance companies against loss or damage in such manner and to the same extent as shall be customary in regard to similar property and business in Brazil. Such insurance shall be payable in amounts and in currencies adequate to protect the interests of the Bank.

Article VI

Miscellaneous

Section 6.01. The Borrower shall maintain or cause to be maintained books and records adequate to identify the equipment and materials financed out of the proceeds of the Loan, to disclose the use thereof in the Project and to record the progress of the Project (including the cost thereof). The Borrower shall permit the Bank's duly authorized representatives, whenever the Bank shall reasonably request, to inspect the Project, the equipment and materials and any relevant records and documents, and shall furnish to the Bank all such information as the Bank shall reasonably request concerning the expenditure of the proceeds of the Loan and the progress of the Project.

Section 6.02. The Borrower shall submit to the Bank, at the following times, the following reports, satisfactory to the Bank in form and substance and bearing or accompanied by evidence of the approval thereof by duly authorized officers of the Borrower:

(a) Within ninety (90) days following the close of each fiscal year of the Borrower, copies of the Borrower's bal-

ance sheet at the close of such fiscal year and of its profit and loss accounts, cash flow statements and other pertinent accounting data relating to such year, together with a report thereon prepared by the auditors of the Borrower;

(b) Within thirty (30) days following the close of each fiscal quarter of the Borrower, copies of the Borrower's balance sheet at the close of such quarter and of its profit and loss accounts, cash flow statements and other pertinent accounting data relating to such quarter; and

(c) During the entire period in which this Contract shall be effective, such other reports as the Bank may from time to time reasonably request with respect to the use of the funds lent, the utilization of the goods acquired with such funds, the progress of the Program, and the operations and financial situation of the Borrower.

All such reports and information provided for under (a) above, and, when the Bank shall so require, all such reports provided for under (b) and (c) above, shall be certified by auditors. Such auditors shall be a firm of independent public accountants, satisfactory to the Bank, whose fees and expenses shall be paid by the Borrower and who shall be authorized to answer directly to the Bank any reasonable requests for information regarding the financial condition of the Borrower. The auditors shall be instructed to furnish copies of such reports to the chief executive officer of the Borrower at the same time as they are sent to the Bank.

Section 6.03. The Borrower agrees that, within seven years from the date of this Contract, at least 25% of all of its capital stock entitled to profit participation shall be held by members of the public other than the present principal shareholders.

Section 6.04. The Borrower shall promptly inform the Bank of any conditions which interfere with, or threaten to

interfere with, the accomplishment of the purposes of the Loan or the maintenance of the service thereof.

Section 6.05. (a) The Borrower represents and warrants that it has not paid, agreed to pay, or caused to be paid, and covenants that it will not pay, agree to pay, or cause to be paid to any person or other entity any commission, fee or other payment in connection with the making of this loan by the Bank, or in connection with any negotiations incident thereto, except reasonable compensation satisfactory to the Bank for bona fide professional, technical or other comparable services incident to presenting the merits of the application for the loan or to operations hereunder.

(b) Prior to and as an additional condition precedent to the first disbursement hereunder, the Borrower shall certify to the Bank the name and address of each payee or intended payee of any such commission, fee or other payment, together with a statement of the services rendered or to be rendered and the amount received or to be received by each; or, if such be the case, that there are no payees or intended payees. Thereafter, the Borrower shall submit to the Bank a similar certificate (i) within ten (10) days after it shall have agreed to pay, paid or caused to be paid, any other commission, fee or other payment, and (ii) within ten (10) days after the final date on which the Bank shall be obligated to make disbursements in accordance with this Contract or after the date on which the final disbursement shall have been made, whichever is earlier. The certificate shall be accompanied by the verification of each payee or intended payee named therein, if any, of the amount of commission, fee, or other payment received or to be received by him, together with his agreement to accept such reduction therein as may be necessary to make such amount satisfactory to the Bank. In the event that the amount of any such commission, fee or other payment is deemed unreasonable by the Bank, the Borrower shall cause a reduction satisfactory to the Bank to be made therein.

Section 6.06. If the Borrower shall not present an application for disbursement prior to December 31, 1961 (or such later date as the Bank shall approve in writing), the Bank, in its discretion, may terminate this Contract, so notifying the Borrower. Upon such notification, this Contract and all of the obligations of the parties set forth herein shall terminate.

Section 6.07. If and when the entire principal amount of the Loan and all interest and other charges which shall have accrued on the Loan shall have been paid, this Contract and all obligations of the parties hereunder shall terminate forthwith and any mortgages given pursuant to this Contract shall be considered extinguished.

Section 6.08. The rights and obligations of the Bank and the Borrower under this Contract shall be valid and enforceable in accordance with the terms hereof, notwithstanding any legislation to the contrary, and as a result, neither the Bank nor the Borrower shall be entitled to assert any claim that any of the clauses or conditions of this Contract is invalid and cannot be enforced or executed.

Section 6.09. Except as the Bank shall otherwise agree, the Borrower shall not:

(a) Incur expenditures for fixed and other non-current assets, other than those required for carrying out the Project or as necessary for repairs or replacements essential to operations, nor declare or pay dividends (except stock dividends resulting from the reappraisal of assets of capitalization of undistributed profits) nor make other distributions nor make any payments of principal or interest on subordinated debt nor redeem or purchase shares of its capital stock if, thereafter, its current assets (i.e., cash, accounts receivable, duplicates, and other readily salable securities) would exceed its current liabilities (all liabilities falling due within one year)

by an amount less than the equivalent of $1,500,000 until December 31, 1965 and the equivalent of $2,000,000 thereafter.

(b) Incur, assume, guarantee or permit to exist any indebtedness except:

(i) Short-term debt incurred in the ordinary course of business not exceeding at any one time outstanding the equivalent of $1,500,000 until December 31, 1965 and the equivalent of $2,500,000 thereafter.

(ii) Debt incurred in the ordinary course of business other than for money borrowed.
For the purpose of this paragraph, suppliers' credits and other similar arrangements shall be deemed to be indebtedness for money borrowed and short-term debt shall be deemed to be any debt maturing by its term within 12 months after the date on which it is originally incurred.

(c) Create or permit to exist any encumbrance, mortgage, pledge, assignment or other lien on any assets of the Borrower, except for (i) the mortgages referred to above; (ii) a tax or any other statutory lien, provided that such lien shall be discharged within 30 days after final adjudication; (iii) any lien on commercial goods to secure a debt, incurred in the ordinary course of business, maturing not more than one year after the date on which it is originally incurred and to be paid out of the proceeds of sale of such commercial goods; and (iv) any lien created on property, at the time of purchase thereof, solely as security for the payment of the purchase price of such property.

For purposes of this provision, the term "lien" shall include mortgages, pledges, debentures, charges, privileges and priorities of any kind, and the term "assets" shall include revenues and property of any kind.

(d) Enter into any transaction with any person, firm or company save in the ordinary course of business, on ordinary commercial terms and on the basis of good faith or appoint or establish any general purchasing or sales agency, or enter into any transaction whereby it might receive less than the full ex-works commercial price (subject to normal trade discounts) for its products.

(e) Enter into any partnership, profit-sharing or royalty agreement or other similar arrangement whereby its income or profits are, or might be, shared with any other person, firm or company, or enter into any management contract or similar arrangement whereby the business and operations of the Borrower are managed by any other person, firm or company.

(f) Make or permit to exist loans or advances to others or investments in other companies or enterprises in excess of an aggregate amount of $1,000,000 equivalent at any one time outstanding, provided that the Borrower shall be at liberty to invest in short-term marketable securities acquired solely to give temporary employment to the idle funds of the Borrower, and that this requirement shall not apply to compulsory loans to governmental entities.

(g) Change its statutes in any manner which would be inconsistent with the provisions of this Contract, its fiscal year, or the nature of its present business; nor sell, transfer, lease or otherwise dispose of all or a substantial part of its capital assets, or undertake or permit any merger, consolidation or corporate reorganization.

(h) Pay any cash dividends to its shareholders or acquire any of its outstanding shares unless the disbursements for such purposes will not exceed 90 percent of the net profit of the Borrower accumulated after December 31, 1960. "Net profit" is defined as gross income from all sources (except revaluation of assets on the books of the Borrower and profits from purchase or retirement of the Borrower's indebtedness) less all operating and administrative expenses, including interest on debt, taxes, provision for legal reserve fund and amounts allocated to reserves for maintenance and depreciation in accordance with sound business practices.

Section 6.10. Upon request of the Bank, the Borrower shall execute and deliver to the Bank promissory notes or other evidences of the obligation of the Borrower to amortize the Loan and to pay interest and commitment charges in accordance with this Contract. Such instruments shall be in the form prescribed by the Bank.

Section 6.11. Any notice, request or communication given, made or sent by the Borrower or by the Bank pursuant to this Contract shall be in writing, and shall be deemed duly given, made or sent to the other party when delivered by hand or by mail, telegram, cable or radiogram to such other party at its address as follows:

To the Borrower:

Mail Address:

Lutcher S.A. Celulose e Papel
Praça Antonio Prado 33, 14° andar
São Paulo, Brazil

Cable Address:

LUTCHERSA
São Paulo, Brazil

To the Bank:

Mail Address:

INTER-AMERICAN DEVELOPMENT BANK
Washington 25, D. C.

Cable Address:

INTAMBANC
Washington, D. C.

Section 6.12. The Bank shall have the right, following notice to the Borrower and subject to due consideration of the interests of the Borrower, to convey to other public or private institutions all or any part of the Loan. In the event that the Bank conveys all or any part of the Loan it will be explicitly provided that all transactions and dealings of the Borrower will be with the Bank only and that such conveyance will not be to the detriment of any of the rights, privileges, and immunities inuring under this Contract to either the Bank or the Borrower.

ARTICLE VII

Arbitration

Section 7.01. Any controversy between the Bank and the Borrower under this Agreement which shall not be settled by agreement of the parties, shall be submitted for decision by an Arbitral Tribunal as hereinafter provided.

Section 7.02. The Arbitral Tribunal shall consist of three arbitrators appointed as follows: one by the Bank; another by the Borrower, and the third, hereinafter referred to as the "Umpire", shall be appointed by agreement of the parties, or, if they shall not agree, by the Secretary-General of the Organization of American States. When appointing their arbitrators, the parties shall also name their successor arbitrators, who shall replace the original arbitrators in case of absence or impediment. If either of the parties shall fail to appoint an arbitrator, the Umpire shall appoint him, and also his successor, who shall have all the powers and duties of the original arbitrator.

Section 7.03. The controversy shall be submitted to arbitration by means of a written notice by one party to the other. This notice shall contain a statement setting forth the nature of the controversy to be submitted to arbitration, the nature of the relief sought, and the names of the arbitrator and his successor appointed by the party instituting such proceeding. The party who receives such notice must, within fifteen (15) days, notify the adverse party of the names of the persons it designates as arbitrator and successor arbitrator. If, within thirty (30) days after the delivery of such notice instituting the arbitration proceeding, the parties shall not have agreed upon an Umpire, either party may request the appointment of an Umpire by the Secretary-General of the Organization of American States, who shall appoint such Umpire and a successor Umpire.

Section 7.04. The Arbitral Tribunal shall convene at such time and place as fixed by the Umpire. Thereafter, the Arbitral Tribunal shall determine when and where it shall meet.

Section 7.05. The Tribunal shall be competent to hear and decide only upon the matters in controversy. Except as the parties shall otherwise agree, the Tribunal shall determine its procedure. In any case, it shall afford a hearing to both parties, allowing to each party a period of not less than ten (10) days for presentation of their allegations and relative documents, and assigning a equal period to hear arguments from both sides on the allegations and documents presented. Copies of all allegations and documents shall be furnished to the adverse party. The award of the Tribunal shall be rendered in writing, and may be rendered without the knowledge of either of the parties. The award may be rendered by the concurrent vote of at least two of the arbitrators. The Tribunal may render its award even when one of the parties shall not have appeared. The award shall be rendered within sixty (60) days after the appointment of the Umpire, and the parties shall be advised thereof by means of a written notice signed by at

least two of the members of the Tribunal. Upon such notification, the award shall be binding and compliance therewith shall be effected within thirty (30) days. No recourse shall be available that does not comply with the award.

Section 7.06. Prior to the convening of the Tribunal, the parties shall fix the amount of the remuneration of the arbitrators and of such other persons as shall be required for the conduct of the arbitration proceedings. If the parties shall not agree on such amount, the Tribunal itself shall fix such compensation as shall be reasonable under the circumstances. Each party shall defray its own expenses in the arbitration proceedings. The cost of the Arbitral Tribunal shall be divided and borne equally by the parties. Any question concerning the division of the costs or procedure for payment thereof shall be determined by the Tribunal itself.

Section 7.07. Service of any notice in connection with the arbitration shall be made in the manner provided in Section 6.11 of this Contract. The parties waive any other form of notice.

In Witness Thereof, the Bank and the Borrower, each acting through its respective duly authorized representative, have executed this Contract in the District of Columbia, United States of America, the date first above written.

Inter-American Development Bank
T. G. Upton
Executive Vice President

Lutcher S. A. Celulose e Papel
F. L. Brown
Procurador

Witnesses:
Philip Glaessner
Freeborn G. Jewett, Jr.

Witnesses:
William W. Rayner
Thos. S. Markey

SUPPLEMENTARY AGREEMENT

between

INTER-AMERICAN DEVELOPMENT BANK

and

LUTCHER S.A. CELULOSE E PAPEL

May 1, 1964

SUPPLEMENTARY AGREEMENT

SUPPLEMENTARY AGREEMENT entered into the 1st day of May 1964 between the INTER-AMERICAN DEVELOPMENT BANK (hereinafter called the Bank) and LUTCHER S.A. CELULOSE E PAPEL (hereinafter called the borrower) supplementing the Loan Contract entered into between the parties hereto on the 14th day of June 1961, for the construction of a cellulose pulp mill and related facilities near the city of Guarapuava in the State of Parana, Brazil.

Article I

By this agreement, the Bank agrees to supplement the loan set forth in Section 1.01 of the aforementioned Loan Contract dated June 14, 1961, by lending to the borrower Four Million United States Dollars (US$4,000,000), all of which shall be disbursed in United States Dollars.

Article II

The Supplementary Loan as set forth in Article I hereof, is for financing the expansion of the above-mentioned pulp mill and related facilities which the borrower has undertaken. This expansion is more fully described in Annex I attached hereto and made an integral part hereof.

Article III

(a) The borrower shall repay the supplementary loan in eight (8) consecutive semi-annual installments beginning December 15, 1971 and terminating June 15, 1975. Payments of the principal shall be made in United States Dollars in accordance with the schedule of amortization appearing in Annex II attached hereto and made an integral part hereof.

(b) The borrower shall pay interest at a rate of 5¾% per annum on the principal amount of the loan outstanding. Payments of interest shall be made in United States Dollars.

(c) The borrower shall pay a commitment fee of three quarters of one percent (¾ of 1%) per annum upon the undisbursed portion of the Supplementary Loan. Such fee shall be payable in United States Dollars and shall accrue commencing ninety (90) days after the effective date of this Supplementary Agreement until the date on which the Supplementary Loan shall have been completely disbursed, or shall have been cancelled in accordance with Section 2.10, or Section 4.01 (as incorporated by reference in Article XV herein) of the Loan Contract.

(d) All amounts due for interest and commitment charge shall be payable on the 15th day of June and the 15th day of December of each year beginning June 15, 1964. In all cases in which it shall be necessary to compute the amount of interest or commitment fee which shall have accrued for less than a six-month period, such computation shall be made on a daily basis using a 365-day factor.

(e) If the amount of the Supplementary Loan that is finally disbursed is less than the amount referred to in Article I herein, the Bank shall readjust proportionally the respective amortization payments and shall deliver to the borrower a new schedule of amortization.

(f) Dividends and repayments of loans to shareholders totalling in excess of 50% of the total net profits of the borrower realized subsequent to January 1, 1964, shall not be paid unless the borrower shall have made amortization payments in addition to those required under Article III(a) herein, equal to the amount to be paid in excess of the above-mentioned percentage.

Article IV

As part of the Supplementary Loan and upon compliance with the requirements set forth in Article XIII, the Bank shall, if the borrower so requests, use part of the sum referred to in Article I herein to establish a revolving fund, in an amount of Eight Hundred Thousand United States Dollars (US$800,000) that the borrower shall use in order to finance expenses relating to the execution of the Project. The Bank shall replenish this fund upon request by the borrower from the resources of the loan where there has been compliance with the requirements of Article VII and Article XIV hereof and Section 3.02 of the Loan Contract as hereinafter modified. All disbursements under this Supplementary Loan in excess of a total of Two Million Four Hundred Thousand United States Dollars (US$2,400,000) shall be made through the Revolving Fund. In its sole discretion the Bank may waive any and all of the requirements of this Article.

Article V

(a) For the purposes of the Supplementary Loan, Section 3.02 of the Loan Contract of June 14, 1961, is amended to read as follows:

> "Every disbursement, except for the constitution of the revolving fund, shall be subject to prior compliance with the following requirements:
>
> "(a) The borrower shall have presented to the Bank an application for disbursement and a statement of a

certified public accountant acceptable to the Bank that the amount of the disbursement has been spent on the Project or the borrower has become committed by virtue of having signed a contract or given a purchase order or by having substantially entered upon an activity which is essential to complete, to expend the amount on the Project, with a brief statement in each case of the nature of the expenditure or commitments involved."

"(b) There shall not have occurred any of the events described in Sections 4.01(a), 4.01(b), 4.01(c), 4.01(f) and 4.01(g), and the borrower shall have delivered to the Bank a certificate to that effect signed by an authorized representative of the borrower and dated as of the date of the respective requests for disbursements."

(b) Disbursements of the loan may be effected only when the project financed by the loan provided for by the contract of June 14, 1961 is in a satisfactory condition, in the opinion of the Bank.

Article VI

The borrower, guaranteeing the obligations, including interest and commission, assumed in this document, is obligated to constitute in favor of the Bank, a second mortgage covering the same immovable property already covered by a first mortgage in favor of the Bank which was registered June 18, 1962 in the Registro de Imóveis Competente in connection with the contract of loan signed July 14, 1961.

Article VII

If the borrower shall not have presented a request for disbursement under this Supplementary Agreement prior to December 31, 1964, (or such later date as the Bank shall approve in writing), the Bank may terminate its obligation

under Article I of this Supplementary Agreement, so notifying the borrower.

Article VIII

Disbursements of the sum referred to in Article I shall only be made on or before two years from the effective date of this Supplementary Agreement or such later date as the Bank shall permit in writing. Following such date, the right of the borrower to receive any part of such sums that shall not have been disbursed shall be terminated.

Article IX

Section 3.03(b) of the Loan Contract dated June 14, 1961, is amended to read as follows:

> "The rate of exchange applicable to the disbursement of cruzeiros under this contract shall be in accordance with the schedule set forth in Annex III of the Supplementary Agreement entered into between the parties hereto on May 1, 1964."

Article X

The borrower shall have the right, upon payment of all accrued interest and charges, and upon not less than sixty (60) days notice to the Bank, to repay in advance of maturity all or any part of the loan at any time outstanding. Any such prepayment shall be credited to the remaining installments of principal in the inverse order of their maturity.

Article XI

"December 31, 1965" stated in Section 6.09(a) and Section 6.09(b)(i) of the aforementioned Loan Contract dated June 14, 1961, shall be amended to read "December 31, 1969."

Article XII

Section 6.07 of the Loan Contract of June 14, 1961, shall be amended to read:

> "If and when the entire principal amount of the Loan and the Supplementary Loan provided for in the Supplementary Agreement dated May 1, 1964, and all interest and other charges which shall have accrued on the Loan and the Supplementary Loan shall have been paid, this Contract and the Supplementary Agreement and all obligations of the parties hereunder shall terminate forthwith and any mortgages given pursuant to this Contract or the Supplementary Agreement shall be considered extinguished and *ipso facto* cancelled."

Article XIII

At the time of the signing of this Supplementary Agreement the borrower will deliver to the Bank:

(a) A legal opinion or opinions, in form and substance satisfactory to it, of counsel acceptable to it: (i) as to the existence and good standing of the borrower and its corporate power to own property and to carry on the business referred to in its charter; (ii) as to the due authorization, execution and delivery by the borrower of this Contract, and the legality, validity and enforceability as against the borrower of this Contract in accordance with its terms; (iii) as to the title of the borrower to the property to be subjected to the lien of the mortgages hereinafter referred to, and as to the existence of any liens, charges or encumbrances thereon.

(b) Satisfactory evidence of the authority of the person or persons who have signed this Agreement on behalf of the borrower and who will act as representatives of the borrower in connection with the operation of this Agreement, together with certified copies in duplicate of the authorized specimen signatures of such persons.

The Bank shall not be obliged to make disbursement of the Supplementary Loan until all the requirements of this Article have been fulfilled.

Article XIV

(a) The borrower, prior to any disbursement of the Supplementary Loan, shall have duly effected the provisional registration of this Supplementary Agreement with the Superintendência da Moeda e do Crédito (SUMOC), in accordance with applicable laws and regulations.

(b) The Bank shall not be obliged to make any disbursement after the first unless the borrower has proven that all previous disbursements have been registered. In no event shall the Bank be obliged to disburse amounts, whether or not through the revolving fund provided for in Article IV, totalling more than Two Million Four Hundred Thousand United States Dollars (US$2,400,000) unless all previous disbursements have been registered in accordance with the previous sentence.

(c) Promptly upon receiving the last disbursement of the loan the borrower shall cause the amount of the loan disbursed but not yet registered with SUMOC to be duly registered with that agency.

(d) The Bank agrees to extend all reasonable cooperation in bringing about the registrations required hereunder.

(e) The borrower agrees to sell to the Banco do Brasil all sums received from the Supplementary Loan which are to be used for local expenses already incurred or to be incurred.

Article XV

Except as expressly related herein, or incorporated by reference, the provisions of the Loan Contract dated June 14, 1961, are not applicable to this Supplementary Loan.

The Bank and the borrower agree that the following specific sections or portions of sections of the aforementioned Loan Contract dated June 14, 1961, between the parties are applicable and are incorporated herein by reference and made a part hereof, as effectively as if fully set forth herein, to wit: Sections 2.05, 2.06, 2.10, 3.01(b). 3.03(a) to the extent it makes the borrower responsible for bank charges, 4.01(a), (b), (c), (f), and (g), 4.04, 4.05, 5.02(b) and (e), 6.01, 6.02, 6.04, 6.05, 6.08, 6.09(a) and (b) as modified by Article XI herein, 6.09(c), (d), (e), (f), (g), and (h), 6.10, 6.11, 6.12, 7.01, 7.02, 7.03, 7.04, 7.05, 7.06, and 7.07.

Article XVI

This Supplementary Agreement shall become effective only if it has been registered by the authorities of Brazil as provided by Article XIV(a) hereof. The effective date of the Contract shall be that on which the Bank receives satisfactory proof that said registration has been so accepted.

In Witness Whereof, the Bank and the borrower, each acting through its respective duly authorized representatives, have executed this Agreement in three equally valid copies in the District of Columbia, United States of America, the date first above written.

Inter-American Development Bank

/s/ T. Graydon Upton
Executive Vice-President

Lutcher S.A. Celulose e Papel

/s/ Douglas Whitlock
Special Representative

/s/ William W. Rayner
Special Representative

Witnesses:

/s/ Thomas S. Markey
/s/ Edward T. Tait

ANNEX I

The proceeds of the US$4,000,000 loan shall be utilized to cover certain expenditures necessary to increase plant capacity from about 100 to 200 tons of pulp per day, as well as to cover certain previously unanticipated but essential project outlays.

Items eligible for disbursement may be drawn from the following general categories, up to the amounts indicated:

1. 126 unit truck fleet with necessary spare parts and support facilities	US$1,550,000
2. Completion of 2,500 KW Jordão River Hydroelectric Project	650,000
3. Spare parts and non-working capital supplies	500,000
4. Materials and equipment necessary to complete the factory	500,000
5. Documented expenses already submitted to the Bank (January-June, 1963)	2,147,000
6. Contingencies	400,000

ANNEX II

Lutcher S.A. Celulose e Papel

Principal Amortization Schedule

Date	Amount
December 15, 1971	US$ 460,000.00
June 15, 1972	460,000.00
December 15, 1972	460,000.00
June 15, 1973	460,000.00
December 15, 1973	460,000.00
June 15, 1974	500,000.00
December 15, 1974	500,000.00
June 15, 1975	700,000.00
Total	US$4,000,000.00

ANNEX III

Date of Disbursement	U. S. Dollar equivalent	Rate of Exchange
June 30, 1962	$ 88,201.85	349.60
July 23, 1962	492,016.12	357.00
September 5, 1962	151,673.59	403.00
September 17, 1962	119,043.14	460.00
September 27, 1962	120,442.84	460.00
October 4, 1962	40,641.08	460.00
October 9, 1962	209,914.08	460.00
October 20, 1962	135,079.47	460.00
November 6, 1962	110,591.09	460.00
November 11, 1962	239,347.34	460.00
December 3, 1962	240,264.11	460.00
December 28, 1962	217,009.20	460.00

Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction

THE FACTS

This is a suit for injunctive relief. Plaintiffs (hereafter Lutcher) are attempting to manufacture pulp in Brazil. Defendant Inter-American Development Bank (hereafter the Bank) is a public international financial institution. It was organized pursuant to the Agreement Establishing The Bank, to which the United States was—and is—a party. Its legal existence dates from December 30, 1959. The United States accepted membership in the Bank pursuant to the provisions of the Inter-American Development Bank Act, 73 Stat. 299, 22 U.S.C. § 283. Section 9 of that Act, 73 Stat. 301, 22 U.S.C. § 283g, provides that the privileges and immunities of the bank, as set forth in Article XI of the Agreement, are to have "full force and effect" in the United States. Under the International Organizations Immunities Act, the Bank is immune from suit and judicial process, except as immunity is waived.

Under its Agreement, the Bank is to promote investment within the Western Hemisphere and to utilize its funds for financing Latin America's economic and social development. The Articles place the substantial resources of the Bank under the control of its Board of Governors. The Board may delegate, and has delegated, most of its powers to the Board of Executive Directors which "shall be responsible for the conduct of the operations of the Bank . . .", Agreement Establishing The Bank Article VIII, Section 3a.

In 1961, the Bank made a loan of some $4.7 million to Lutcher. Shortly thereafter, the Bank loaned $5,000,000 to another putative Brazilian pulp manufacturer—Papel e Celulose Catarinense Ltda. (hereafter Klabin). See Upton Aff., Attachments 2 and 3.) Under the loan agreement with Klabin, the Bank has the authority to grant or deny

Klabin permission to incur additional indebtedness (Upton Aff., Attachment 3, Para. 10c). The complaint alleges that Klabin now wants to borrow additional capital from other sources in order to expand his plant and compete with Lutcher (Cplt., Paras. 9, 14). Lutcher seeks to enjoin the Bank from permitting Klabin to attract any new capital (Pl. Motion, p. 1). Lutcher suggests that the 1961 loan to his competitor was imprudent, and that the Bank had "impliedly warranted"—presumably to all pulp manufacturers in Latin America—that it would "lend prudently" (Cplt., Para. 13). Lutcher does not want the Bank to "perpetuate and compound" its earlier error of helping his competition (Cplt., Para. 13). For good measure, it would bar the Bank from helping "any" pulp or paper plant in Latin America, from disposing of its records, from assigning any employee unless the employee would be available for discovery and trial, and from transferring to any borrower in any country "in excess of $1,000" without advising Lutcher (Cplt. at p. 11).

Summary of Argument

The Complaint must be dismissed and Plaintiff's Motion for Preliminary Injunction denied because the Bank, its property and is operations are immune from suit and judicial process by virtue of the International Organizations Immunities Act, 59 Stat. 699, 22 U.S.C. § 288a, and the Articles Establishing the Bank, which are made fully effective in the United States by the Inter-American Development Bank Act, 73 Stat. 301, 22 U.S.C. § 283g.

The suit must also be dismissed because the plaintiffs are without standing and have no cause of action to enjoin the Bank's relations with Lutcher's competition.

The Motion for Preliminary Injunction must be denied for the above reasons, and for the additional reasons that Section 3 of Article XI of the Agreement Establishing the Bank provides that in no suit of any character are the as-

sets of the Bank subject to legal process in advance of final judgment, and furthermore because on balance plaintiffs have no case for a Preliminary Injunction against the Bank.

STATUTES, EXECUTIVE ORDERS AND AGREEMENTS INVOLVED

A. International Organizations Immunities Act, 59 Stat. 669, 22 U.S.C. § 288a:

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registra-

tion of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

B. Agreement Establishing the Inter-American Development Bank

Article XI. Status, Immunities and Privileges

Section 1. *Scope of Article*

To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be accorded to the Bank in the territories of each member.

Sec. 2. *Legal Status*

The Bank shall possess juridical personality and, in particular, full capacity—

(a) to contract;

(b) to acquire and dispose of immovable and movable property; and

(c) to institute legal proceedings.

Sec. 3. *Judicial Proceedings*

Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, member countries shall have recourse to such special procedures to settle controversies between the Bank and its members as may be prescribed in this Agreement,

in the bylaws and regulations of the Bank of in contracts entered into with the Bank.

Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.

Sec. 4. *Immunity of Assets*

Property and assets of the Bank, wheresoever located and by whomsoever held, shall be considered public international property and shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

Sec. 5 *Inviolability of Archives*

The archives of the Bank shall be inviolable.

Sec. 6. *Freedom of Assets from Restrictions*

To the extent necessary to carry out the purpose and functions of the Bank and to conduct its operations in accordance with this Agreement, all property and other assets of the Bank shall be free from restrictions, regulations, controls and moratoria of any nature, except as may otherwise be provided in this Agreement.

Sec. 7. *Privilege for Communications*

The official communications of the Bank shall be accorded by each member the same treatment that it accords to the official communications of other members.

Sec. 8. *Personal Immunities and Privileges*

All governors, executive directors, alternates, officers and employees of the Bank shall have the following privileges and immunities:

(a) Immunity from legal process with respect to acts performed by them in their official capacity, except when the Bank waives this immunity

C. Inter-American Development Bank Act, 73 Stat 301, 22 U.S.C. § 283g.

Section 9. *Status, Privileges, and Immunities* . . .

The provisions of article X, section 4(c), and article XI, sections 2 to 9, both inclusive, of the agreement shall have full force and effect in the United States, its Territories and possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in, and the establishment of, the Bank.

D. Executive Order No. 10873, As Amended by Executive Order No. 11019, 3 C.F.R. 404, 599 (April 8, 1960, April 27, 1962).

Inter-American Development Bank Entitled to Enjoy Certain Privileges, Exemptions and Immunities.

By virtue of the authority vested in me by section 1 of the International Organizations Immunities Act, approved December 29, 1945 (59 Stat. 669), and having found that the United States participates in the Inter-American Development Bank under the authority of an Act of Congress approved August 7, 1959 (73 Stat. 299), I hereby designate the Inter-American Development Bank as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act; provided, that such designation shall not be construed to affect in any way the applicability of the provisions of Section 3, Article XI, of the Articles of Agreement of the Bank as adopted by the Congress of the United States in the Inter-American Development Bank Act (73 Stat. 299; 22 U.S.C. 283-283i).

The designation of the Inter-American Development Bank as a public international organization within the meaning of the International Organizations Immunities Act shall not be deemed to abridge in any respect privileges, exemptions, and immunities which that organization may

have acquired or may acquire by treaty or congressional action.

ARGUMENT

This memorandum is addressed to our view that the Plaintiff states no cause of action and that the Complaint should be dismissed. The Complaint contains a wide range of assertions which are factually incorrect, as well as substantial argumentative material inappropriate to civil pleading. We take the allegations, as they stand, however, and contend that there is here no cause of action under any interpretation of the facts.

I. *The Complaint Should Be Dismissed Because the Bank, Its Assets and Its Operations Are Immune from a Suit of this Nature by One of Its Borrowers.*

The Bank is an international financial institution like the International Bank for Reconstruction and Development (the World Bank), the International Finance Corporation and the International Development Association.[1] Since the first Bretton Woods Agreement, these four instituitons have been clothed with a well-defined system of immunities and exemptions.[2] The immunities and exemptions are those which are appropriate and necessary to the international character of the institutions, to their freedom and discretion to conduct the development finance functions which the member nations have delegated to them, and to the maintenance of their headquarters' operations and staffs in the District of Columbia. These immunities are set forth in two related, interdependent bodies of law: (1) the International Organizations Immunities Act, which by

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1 See the Bretton Woods Agreement Act, 59 Stat. 512, as amended, 22 U.S.C. 286; the International Finance Corporation Act, 69 Stat. 669, as amended, 22 U.S.C. 282a; and the International Development Association Act, 74 Stat. 293, 22 U.S.C. §§ 284-284g.

2 The International Monetary Fund, though covered by the Bretton Woods Agreement Act, stands on a somewhat different footing.

Executive Orders from time to time has been extended to each of these organizations, including the defendant Bank, and (2) the Agreements of the member nations establishing these institutions, which have been made effective within the United States by statute.

A. *The International Organizations Immunities Act.*

The International Organizations Immunities Act was enacted in 1945. It provided that those organizations which the President might designate would have the capacity to enter into contracts, to acquire and dispose of property and to institute legal proceedings. Section 2(a). The extent to which they could be sued, however, was carefully defined. The Act extended sovereign immunity to them, but an immunity which could be waived: "their property and their assets" would have "immunity from suit and every form of judicial process as is enjoyed by foreign governments" except insofar as the organization itself might explicitly waive its immunity "for the purpose of any proceedings or by the terms of any contract." Section 2(b).

B. *The Agreement Establishing the Bank.*

The several agreeemnts establishing these four international financial institutions have made complementary provision for immunities. In executing the agreements, each member nation undertook to recognize and honor those immunities. Congress has approved each agreement.

The Agreement Establishing the Inter-American Development Bank closely follows the World Bank, the IFC and the IDA Agreements. Like the International Organizations Immunities Act, Article XI of this Agreement provides that the Bank may contract, that it may hold property and that it may institute legal proceedings. Agreement, Article XI, Section 2. Its property—"considered international property"—is "immune from search . . . expro-

priation or any other form of taking . . . by executive or legislative action." Section 4. Like that Act, the Agreement provides that the archives are "inviolable." Section 5.

Section 6 of the Agreement provided that the Bank's property "shall be free from restrictions . . . of any nature . . . to the extent necessary to carry out the purpose and functions of the Bank and to conduct its operations in accordance with this Agreement." And Section 3 makes explicit provision with respect to suits brought against the Bank.

Some suits against the Bank are clearly contemplated, but Section 3 does not repeal the sovereign immunity established by the International Organizations Immunities Act. Instead, it adds certain principles:—that in no event can members sue, that in no event may property be attached before judgment and that such suits as might lie against the Bank may be instituted only in certain nations:—those where the Bank has an office, has appointed an agent or has sold or guaranteed securities.

In authorizing acceptance of membership in the defendant Bank, Congress, as in the case of other international financial institutions, made explicit provision in Section 2 of the Inter-American Development Bank Act that the immunity provisions of the Agreement Establishing the Bank "would have full force and effect" in the United States.

C. *The Designation of the Bank As an International Organization.*

The Bank has been designated an international organization, as provided in Section 1 of the International Organizations Immunities Act, by Executive Order 10873, April 8, 1960, as amended by Executive Order 11017, April 27, 1962. 3 C.F.R. 404,599. In its final form the Bank's designation is now identical to that of the World Bank's,

for which see 3 C.F.R. 1943-1948 Compilation, p. 558. The Order provides that the designation "is not intended to abridge in any respect the privileges, exemptions and immunities which that organization may have acquired by . . . Congressional action." Thus, the action of the Congress making the provisions of the Agreement Establishing the Bank effective within the United States remains in effect. Finally, the Order provides that the designation would also not affect the immunity provisions of Article XI, Section 3 of that Agreement. In short, the systems of immunity are complementary and mutually reinforcing.

D. *The Scope of These Immunity Provisions.*

The fair intendment and meaning of this complex of immunity provisions is this: before this Court the Bank is in substantially the same posture as a sovereign government.[3] It may not be sued absent a waiver of immunity.

This system of waivable immunity serves a distinct purpose, of permitting suit where suit will contribute to the effective operation of the Bank and barring it where suit would frustrate and impede. Thus, the Bank is not immune from suit by a holder of one of its bonds or of its participation certificates to enforce the Bank's specific promise to pay.[4] It has explicitly promised to make payment on these obligations and has thereby taken enforcement of these obligations outside the Immunities Act. This case stands on an entirely different footing. Plaintiffs plead no waiver.

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[3] See *International Organizations*, 71 Har. L. Rev. 1300, 1310-1311 (1958). The immunity of foreign sovereigns, of course, has been a "part of the fabric of our law" since *Exchange* v. *McFadden*, 7 Cranch 116 (1812). See *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955). It is impossible for a claimant to secure money judgment in a court of this nation against a foreign country; the property of a foreign government is immune; and a suit to enjoin such a government from making a discretionary decision within its competence to aid plaintiff's competitor is inconceivable.

[4] For a description of the Bank's successful efforts to raise capital in the private money markets of the world, see Upton Affidavit, para. 5.

And there is none. Unlike the situation of a suit by a bondholder, Lutcher is not seeking to enforce a specific promise contained in his agreement with the Bank; there is nothing of a commitment by the Bank not to give aid and comfort to others in the pulp industry like the promises the Bank has given on its debt paper.[5]

Furthermore, the availability of judicial relief to a holder of the Bank's bonds, for example, in fact serves, in the words of Article XI, Section 6, the "purpose and funtions of the Bank . . . and its operations." Suits of this character would not. Bondholders, for example, must be able to sue if the Bank is to sell its bonds in the prime bond markets of the world.

Here, however, no draftsmen of the relevant Acts, Agreements or Executive Orders could have thought to help the Bank by opening the door to litigation like this. To expose the Bank to such suits would hardly contribute to its financial reputation or the marketability of its securities. The suit would, in fact, have a profound effect on the Bank's "purpose and functions . . . and its operations," as we shall now show:

1. *The Heart of the Complaint—the Klabin Borrowing.*

Lutcher seeks in the first instance to bar the Bank from exercising its independent judgment whether to allow Klabin to secure additional capital and expand its plant. Such matters are, and must be, wholly within the discretion of the Bank. The attraction of capital, the exercise of fiduciary responsibility with respect to that capital, the processing of loans and policy decisions with respect to lending and management are matters which by international agreement the member nations have placed within the hands of the Board and the President. The Bank's

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[5] And, of course, even if the agreement did contain such an explicit promise, Lutcher could enforce that explicit promise only in arbitration, as the contract provides.

property for this purpose is to be "considered public international property." The relief sought here—even the limited relief of blocking the Klabin request, to say nothing of the extensive requests for an injunction touching on travel, disbursement of funds and the Bank's "inviolable" records—would block the exercise by the Bank of its international trust and responsibility, represent precisely the kind of intervention in the "functions of the bank" and its property which the International Organizations Immunities Act and the Agreement Establishing the Bank sought to guard against, and would be intolerable under any notion of sovereign immunity.

To allow this suit would expose the Bank to similar challenge by any of the borrowers under its hundreds of existing loan agreements—and if we read the complaint correctly as one not even arising out of the lender-borrower relationship,[6] then to suits by any businessman, taxpayer or citizen interested in the fashion in which the Bank conducts its business as well. Such suits could be filed not only here but in any of the nations of Latin America, and in the countries of Europe where the Bank has sold its bonds. Each court could seek to enjoin the Bank from the exercise of its discretion in all manner of ways. Lutcher hopes to block the Bank from deciding whether to aid one of its competitors. Another suit could litigate whether the Bank should make a particular loan for farm credit; still another, whether the Bank ought to declare a borrower in default; a third, whether the Bank should use its resources for power plants rather than low-cost housing. These are all matters of judgment and management but this suit would make them matters of judicial inquiry. The Bank's affairs would be subject to scrutiny by any court, domestic or foreign, where it could be found. Complainants with

[6] As stated, such disputes, by the terms of Lutcher's agreement with the Bank, must be remitted to arbitration. Upton Affidavit, Attachment 2, Section 7.01. Hence, the complaint must plead some other dispute not arising under the loan.

conflicting interests would be tempted to institute conflicting injunction proceedings in different fora. Under even the narrowest reading of the complaint, the Bank's business would be moved from the Board Room to the courts.

2. *The Actual Prayers for Relief.*

Lutcher's ambitious prayers for injunctive relief—in contrast to the complaint which is directed at the Klabin debt decision—go even further. It is impossible to read the Agreement Establishing the Inter-American Development Bank without being impressed with the extent to which the relief sought would frustrate the functions of the Bank and the assumptions by the Congress as to how the Bank would operate when it granted its approval to U.S. membership in 1959.

Thus, under the Articles, the Bank is to promote investment within the hemisphere, is to utilize its funds for financing development and economic growth, and is to encourage private investment. Agreement, Article I, Section 2. The substantial resources of the Bank are placed under the Board of Governors. Article VIII, Section 2. The Board may delegate—and has delegated—the bulk of its powers to the Board of Executive Directors, Id. at Section 2(b), which "shall be responsible for the conduct of the operations of the bank," Id. at Section 3(a). The Board of Governors is to elect the President of the Bank and he is to "conduct the ordinary business of the bank and shall be chief of its staff," Id. at Section 5(a), as well as its "legal representative," Ibid. In addition, the Articles provide for an Executive Vice President to be appointed by the Board who, under the direction of the President and the Board "shall exercise such authority and perform such functions in the administration of the bank as may be determined by the Board of Executive Directors," Id. at Section 5(b).

The injunction would take the control of the Bank and its funds away from these officers. It would be impossible

for the Bank to make fund transfers outside the United States without advising Lutcher (Plaintiff's Motion, p. 3, para. 5). The Bank makes disbursements at an average of almost one million dollars per day (Upton Aff., para. 9). Borrowers request disbursements with requisite documentation and the Bank's officers process these documents as a matter of course and in substantial volume practically whenever the Bank's doors are open. To require the Bank to advise Lutcher—or other potential claimants—whenever it wishes to make a disbursement, which are after all the critical operations of the Bank so far as its borrowers are concerned—would seriously affect the affairs of the Bank.

Lutcher also seeks to enjoin all travel by Bank staff (Plaintiff's Motion, p. 2, para. 4). Such an injunction would have the effect of prohibiting any Bank staff personnel from moving to or from Latin America, from working out new loan projects or from implementing existing projects.

Finally, Lutcher asks for broad protections against movement or disposition of Bank papers (Plaintiff's Motion, p. 2, para. 3). Here too, the effect would be substantial. The Bank's operations could be stymied.

• • •

In contrast to the extraordinary and far-reaching relief sought in plaintiff's motion, the relevant statutory provisions and Articles of Agreement contemplate a broad exemption, not only of the Bank as a defendant, but of its property and assets as well. It is as immune as any sovereign from suits of this nature where there is no breath of a waiver. The complaint should be dismissed.

II. *Plaintiff Has No Standing and No Cause of Action.*

Quite apart from the Bank's immunity from a suit of this character, the plaintiffs have no legal standing to institute it and no cause of action. The Motion for a

Preliminary Injunction should be denied and the suit dismissed for this reason as well.

This is not a suit to redress any breach of duty by the Bank arising out of the 1961 loan agreement. Nor has the action been brought to enjoin an act in violation of the Bank's loan agreement or to require an act in adherence to the agreement.[7] Rather, plaintiffs seek the extraordinary relief of an injunction against the exercise of the Bank's discretion to grant or deny Klabin—a stranger to the Bank's dealings with plaintiffs—authority to incur additional debt in order to expand Klabin's pulp and paper facilities in Brazil.[8] Plaintiff claims that such expansion by Klabin might injure or destroy plaintiffs' operations.

There is nothing in the Bank's agreements either with Lutcher or with Klabin that protects either of them from the competition of the other. There is no allegation that any law of the United States, or of Brazil, protects Lutcher from competition or grants him a monopoly. Simply stated, plaintiff seeks to enjoin an act of the Bank which may result in increased—and, so far as appears, perfectly lawful—competition in the Brazilian pulp and paper industry. In *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938), a case closely parallel to this, a plaintiff's standing to maintain exactly such an action was expressly rejected by the United States Supreme Court.

There, petitioner was a power company in Alabama. Respondent, as Administrator of the Federal Emergency Administration of Public Works, under the NIRA, was

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[7] The Lutcher agreement with the Bank requires that such disputes be remitted to arbitration (Upton Aff., Attachment 2, Section 7.01).

[8] It is interesting to note that the right of the Bank to exercise this discretion arises out of its agreement with Klabin, and, therefore, from the point of view of the plaintiff, it is pure chance the Bank has any relation or authority with respect to Klabin, or that it can, as lender, limit increased borrowing from third parties by Klabin.

authorized to make loans for public works projects. He had agreed with four municipalities in Alabama to finance the construction of electric distribution systems. Petitioner sued to enjoin the agreements and alleged loss of business if the competing plants were built. The Supreme Court upheld the dismissal of the action; even if the loan were unlawful and beyond the statutory authority of the defendant—a claim far beyond any pressed here—plaintiff had no standing and no cause of action:

> "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys . . . presents a clear case of *damnum absque injuria*. . . .
>
> "The ultimate question which, therefore, emerges is one of great breadth. Can any one who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. And that question suggests another: Should the loan be consummated, may such a one sue for damages? If so, upon what ground may he sue either the person making the loan or the person receiving it? Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose. If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants, are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed.
>
> "John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a

manufacturing concern which, under its charger, is without authority to make the loan. The loan, if made, will be *ultra vires.* The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted." 302 U.S. 479-81.

The decision of the Supreme Court in *Alabama Power Co.* has been consistently and repeatedly followed. For example, in *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 928 (D.C. Cir), *cert. denied* 350 U.S. 884 (1955), the Court of Appeals for this Circuit held that the plaintiffs, electric utility companies, had no standing to enjoin the lending of funds to competitive power cooperatives by the Rural Electrification Administration. As here, none of the plaintiffs had exclusive franchises protecting them from competition. They claimed, however, that the proposed REA loans to the competitive power cooperatives would duplicate their facilities and encourage "destructive federally-subsidized competition" in the generation and sale of electric power. It was alleged that the defendants, by making loans with such an effect, were "misusing" their authority contrary to the REA Act and the Constitution. The Court of Appeals found that, as here, "the essence of plaintiffs' complaint is the competi-

tion which they will suffer if the Government's contracts are carried out."

> "Their sole interest and objective is to eliminate the competition which they fear. Controlling decisions of the Supreme Court, dealing with other electric power contracts of the Federal Government, establish that an interest of this kind is not sufficient to enable them to sue to enjoin execution of the power contracts and program of the Government. [Citing *Alabama Power Co.* v. *Ickes* and other cases]."

Accord, *Texas State AFL-CIO* v. *Kennedy*, 330 F. 2d 217 (D.C. Cir.), *cert. denied*, 379 U.S. 826 (1964); *Pennsylvania R.R.* v. *Dillon*, 335 F. 2d 292 (D.C. Cir.); *cert. denied*, 379 U.S. 945 (1964); *Berry* v. *Housing & Home Finance Agency*, 340 F. 2d 939 (2nd Cir. 1965).

Our position is that Lutcher likewise has no standing to challenge the Bank's judgment whether to foster—or not to foster—competition in the pulp industry in Brazil. Lutcher may use any appropriate means to insure its success—by improving management, acquiring modern machinery and arranging its own finances—but it may not attack a competitor by resorting to the courts to intrude on the discretionary judgments of a banking institution with whom his competitor happens to be doing business. Lutcher could not succeed if this suit had been instituted against a private bank. No court would enjoin a private bank at the behest of one borrower from permitting another of its borrowers to gather new capital. The result is even more compelling here:

(1) In the first place, as in the cases discussed above, the Bank is a public institution.

(2) Furthermore, Lutcher's complaint arises because of what he apparently conceives to be an over capacity in the

pulp industry in Brazil. For this Court to grant an injunciton, which might have the effect of frustrating expansion in that industry, would be to inject it into a sensitive area of public policy in a foreign land.

(3) Furthermore, it is the public policy of the United States to foster competition, not to restrain it. Lutcher seeks to use the court as a lever against the Bank, for purposes of suppressing its competition by restraining Klabin from expanding its capacity. The injunction Lutcher seeks would conflict with all notions of public economic policy in the United States.

For these reasons, we urge that the complaint cannot be held to state a cause of action, and that plaintiff has no standing to maintain it. The suit should be dismissed.

III. *The Articles of Agreement and the Equities Bar the Issuance of a Preliminary Injunction Against the Bank in Any Proceeding.*

To sustain a motion for a preliminary injunction, plaintiffs must demonstrate a probability of success on the merits. Since we have shown in Sections I and II that the plaintiff has no standing to maintain this action and that the Bank is immune from this suit, plaintiffs' Motion for Preliminary Injunction should be denied and the complaint dismissed. There are, however, additional compelling reasons for refusing to issue the injunction, apart from immunity and standing.

Paragraph 3 of Section 3 of Article XI of the Agreement Establishing the Bank, which governs proceedings against the Bank where immunity does not apply, provides that:

> "the property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from

all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

This provision of the Agreement is expressly made effective in the United States by Section 9 of the Inter-American Development Bank Act. As a result, it is clear that even if plaintiff could maintain this action against the Bank, preliminary relief must necessarily be denied.

Furthermore, any balancing of the equities and costs of the proposed injunction clearly favors the Bank. All other matters aside, if the injunction were denied and the Bank then did move forward to grant Klabin permission to incur additional indebtedness, it would clearly take some time before Klabin were able to arrange for new capital and invest it in expanded equipment. And the competitive effects on Lutcher are hard to foresee. Lutcher's request for injunction is thus based on an injury which is both far in the distant future and speculative at that.

On the other hand, the proposed injunction would seriously condition the activities of the Bank, in dispatching loan officers to Latin America, in making disbursements, including those to Klabin or to any other borrower—except presumably to Lutcher himself—without advising Lutcher, in exercising its management discretion and judgment. Furthermore, the injunction would constitute a precedent with respect to other international financial organizations engaged in the world-wide development effort. These institutions operate pursuant to an agreement to which the United States is a party, and manage billions of dollars of resources, a large portion of which have been contributed by the United States. The consequences of the injunction for this pattern of international finance are, to say the least, rather far-reaching. To qualify their management and administration of these programs would affect one of the great and noble purposes of United States foreign policy today and endanger the economic and social

development effort which is so critical to the future hopes of the Free World.

Respectfully submitted,

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Dated: March 14, 1966

Plaintiffs' Memorandum of Points and Authorities in Support of Opposition to Defendant's Motion to Dismiss

POINT ONE: DEFENDANT IS NOT IMMUNE FROM SUIT HAVING EXPRESSLY WAIVED ANY IMMUNITY

Defendant contends that it is immune from suit by virtue of the International Organizations Immunities Act (59 Stat. 699, 22 U.S.C.A. 288a), but plaintiffs direct the court's attention to Section 288a of Title 22, United States Code, which states:

> "(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, *except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings* or by the terms of any contract." (Emphasis added.)

The Articles of Agreement Establishing The Inter-American Development Bank, Appendix I to Upton Affidavit, Article XI, Section 3, page 23, state:

> "Judicial Proceedings
>
> Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member *in which the Bank has an office,* has appointed an agent for the purpose of accepting service or notice of process, *or has issued or guaranteed securities.*
>
> • • •
>
> "Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank." (Emphasis added.)

The principal office of the Bank is located at 808 17th Street, N. W., Washington, D. C. See Article XIV, Section 1 of the Articles of Agreement Establishing The Bank, Appendix I to Upton Affidavit, page 26:

> "The principal office of the Bank shall be located in Washington, District of Columbia, United States of America."

The defendant has issued securities in the United States. Mr. T. Graydon Upton, Executive Vice President of the defendant, in paragraph 5 of his Affidavit filed by defendant March 14, 1966, states:

> "The Bank has marketed seven bond issues totalling $296.8 million, and has made one direct borrowing of $15 million. Three of these issues, totalling $225 million, were sold in the United States and the remaining four, aggregating $71.8 million, were sold in Italy, Germany, and the United Kingdom. • • •"

It is clear beyond doubt that the defendant, by the express language of Article XI, Section 3, quoted supra, has waived immunity from judicial proceedings and acknowledges that a "final judgment against the Bank" can be rendered.

Furthermore, the Executive Order (No. 10873, As Amended By Executive Order No. 11019, 3 C.F.R. 404, 599, (April 8, 1960, April 27, 1962)) designating the defendant as an International Organization, expressly and specifically recognized and left untouched the defendant's susceptibility to suit under Article XI, Section 3, quoted supra. The Executive Order, quoted at page 7 of defendant's Memorandum, states:

> "* * *, I hereby designate the Inter-American Development Bank as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act; PROVIDED, THAT SUCH DESIGNATION SHALL NOT BE CONSTRUED TO AFFECT IN ANY WAY THE APPLICABILITY OF THE PROVISIONS OF SECTION 3, ARTICLE XI, OF THE ARTICLES OF AGREEMENT OF THE BANK AS ADOPTED BY THE CONGRESS OF THE UNITED STATES IN THE INTER-AMERICAN DEVELOPMENT BANK ACT (73 Stat. 299; 22 U.S.C. 283-283i). (Emphasis added.)

Contrary to the contention of the defendant, International Organizations do not have the same posture as sovereign governments. Sovereign governments can confer immunity but International Organizations have only such immunities as their creating instruments confer. As set forth above, the Articles of Agreement Establishing the Bank expressly provide that judicial proceedings can be brought against the Bank and this action does not seek to seize, attach, or execute before final judgment.

Point Two: Plaintiffs Have Standing To Maintain This Action

Defendant's citation of *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938) actually supports the position of the plaintiffs. In the *Alabama Power* case the plaintiffs had no relationship with the lending agency—the Federal Emergency Administration. There was no privity.

But in the instant case there is a direct relationship between the plaintiffs and the defendant. Lutcher S.A. and the defendant entered into a contract on June 14, 1961, involving a loan of $4,700,000; and Lutcher S.A. and the defendant entered into a supplementary contract on May 1, 1964, involving a loan of $4,000,000.

By the terms of those two contracts, copies of which are attached to the Upton Affidavit filed by the defendant on March 14, 1966, as Appendix II, plaintiff Lutcher S.A. undertook to perform certain obligations. F. Lutcher Brown, the largest shareholder and one of the largest creditors of Lutcher S.A., also incurred certain obligations and rights.

The defendant insisted upon the inclusion of Section 6.03 in Article VI of the contract with Lutcher S.A. dated June 14, 1961 (Appendix II to Upton Affidavit) which states:

> "The borrower agrees that, within seven years from the date of this Agreement, at least 25% of all its stock entitled to profit participation shall be held by members of the public other than its present principal shareholders."

This provision in the loan contract evidences that the "present principal shareholders" of Lutcher S.A., notably F. Lutcher Brown, undertook certain obligations and, in return, the obligations of the Bank under that contract and its supplement dated May 1, 1964, ran as well to those

shareholders. To this extent the obligations of the Bank were joint to the shareholders. Where an obligation is in joint form but the obligees may suffer separate and distinct pecuniary injuries from a breach of the covenant, it may be regarded as several. 17 C.J.S. Contracts Section 351, p. 806.

As the defendant quoted the Supreme Court in the *Alabama Power Co.* case:

> "The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may upon that ground, enjoin the loan."

See defendant's Memorandum, page 21. The plaintiffs have standing to maintain this suit by virtue of the aforementioned contracts.

The defendant, having full knowledge of the great risks involved, encouraged Lutcher S.A. to build its plant in a remote and undeveloped region of Brazil in order to foster the economic growth of that region. The defendant knew that it would be difficult for the plaintiffs to find suitable financing for such a project. Indeed, it is specified in Article III, Section 7 of the Articles of Agreement Establishing the Bank (Appendix I to Upton Affidavit):

> "(ii) in considering a request for a loan or a guarantee, the Bank shall take into account the ability of the borrower to obtain the loan from private sources of financing on terms which, in the opinion of the Bank, are reasonable for the borrower, taking into account all pertinent factors; . . ."

This means that the Bank will make or guarantee a loan only when financing from other sources is not available on reasonable terms. Therefore, it conclusively follows that the Bank has full knowledge that the borrowers with which it contracts are embarking on enterprises of great hazard-

ous risks and knowing this, the Bank has the highest duty to avoid hindering or obstructing its borrowers.

This is the crucial distinction between the instant case and the cases relied upon by the defendant. In the instant case there is a clear duty, and the duty has been breached. In the cases cited by the defendant, there was no duty running from the defendant to the plaintiff.

The plaintiffs' situation here is more like that of the plaintiffs in *Union Trust Co. of Pittsburgh* v. *Bd. of Ed. City of Chicago,* 66 F. Supp. 88 (D.C.N.D. Ill., 1937) wherein holders of warrants issued by the City of Chicago in anticipation of taxes levied for educational and building purposes were granted injunctive relief against the City of Chicago and its Board of Education and other officers and agents restraining payment of outstanding warrants.

The plaintiffs certainly have a legitimate interest in seeing to its that the defendant Bank fulfills Article I, Section 2(b) of the Articles of Agreement Establishing the Bank (Appendix I to Upton Affidavit) which requires the Bank in carrying out its functions, to cooperate "with private sources supplying investment capital". Lutcher S.A. and F. Lutcher Brown have supplied investment capital along with the Bank but the Bank now, rather than cooperating with Lutcher S.A., is about to take action detrimental to the best interests of Lutcher S.A., Klabin, and the Bank.

The verified complaint and plaintiff F. Lutcher Brown's Affidavit set forth factual allegations, none of which are denied by the defendant, either in its Memorandum or in the Upton Affidavit. Plaintiffs' documents state the damage already done to Lutcher S.A. and directly and individually to F. Lutcher Brown, and the imminent irreparable damage that will result if the defendant "did move forward to grant Klabin permission to incur additional indebtedness." Plaintiffs urge that upon this state

of the pleadings the court's discretion ought to be exercised in favor of granting the Preliminary Injunction that plaintiffs seek.

On pages 14, 15 and 16 of its Memorandum in support of its Motion To Dismiss, defendant contends that neither this suit nor any other such suit to determine contract rights of its borrowers can be reviewed in the courts. But this argument is completely inconsistent with the defendant's action in paragraph 15 of the Klabin Agreement dated June 9, 1965 (Appendix III to Upton Affidavit), which states that controversies arising thereunder shall be determined by an arbitral tribunal which shall be "governed in its evaluation of the facts and in arriving at a decision, by the law of the District of Columbia, United States of America." With this provision in the Agreement and with the Bank being situated in the District of Columbia, it is inevitable that the courts of this jurisdiction would become involved either in reviewing the decision of the arbitral tribunal or enforcing its award.

POINT THREE: PLAINTIFFS HAVE STATED A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED

The Complaint alleges, paragraphs 5, 6, 10, 11, 12 and 13, that in certain specific respects the defendant has breached its duty to the plaintiffs not to hinder or obstruct the plaintiffs in performing their obligations under the contracts between Lutcher S.A. and the defendant dated June 14, 1961, and May 1, 1964.

It is stated in *Williston On Contracts,* Rev. Ed. (1937), Vol. 5, Section 1293A, p. 3687:

> "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which will hinder or obstruct that other in doing that thing."

See also *Beuttas* v. *United States*, 60 F. Supp. 771 (Ct. Cl., 1944); *United Steelworkers of America (AFL-CIO) Local Union No. 4264* v. *New Park Min. Co.*, 273 F. 2d 352 (C.A. 10th 1959); *American Trading & Production Corp.* v. *United States*, 172 F. Supp. 165 (D.C. Md., 1959); *Geo. A. Fuller Co.* v. *United States*, 69 F. Supp. 409 (Ct. Cl., 1947); *Peter Kiewit Sons* v. *United States*, 151 F. Supp. 726 (Ct. Cl., 1957); *Chalender* v. *United States*, 119 F. Supp. 186 (Ct. Cl., 1954).

The defendant does not deny that it acted erroneously in 1962 when it granted the Klabin loan, nor does defendant deny that Klabin still has not commenced construction. Complaint, paragraph 5. In fact, Appendix III to the Upton Affidavit is an Agreement dated June 9, 1965, between Klabin and the defendant which recites that Klabin has not executed the project subject of the 1962 loan contract.

Defendant's pleading seems to be one in the nature of confession and avoidance. Defendant seems to contend that, while it may have been wrong once and may be wrong again, that its actions are not subject to question. But plaintiffs have shown under POINTS ONE and Two above, and here under POINT THREE, that the plaintiffs clearly can resort to this court for protection of contractual rights.

As a matter of policy the courts have always frowned on efforts to prevent parties to a dispute from seeking relief in the courts. Banks are no different from any other entity that may be enjoined from acts detrimental to another party. This is so elemental that Corpus Juris Secundum 9 C.J.S. Banks and Banking § 404 (a) p. 823 simply says: ". . . the nature and form of the remedy available to be pursued in an action by or against a bank is ordinarily determined by the rules which prevail with respect to actions generally."

Plaintiffs do not seek to restrain competition or obtain a monopoly. Quite the contrary. The Klabin group was

in the pulp and paper business before Lutcher S.A. Klabin, at the time it sought the $5,000,000 loan from the defendant, was "the largest and dominant factor in the entire pulp, paper industries and were a monopoly in the newsprint industry in Brazil." Complaint, paragraph 4. The defendant encouraged Lutcher S.A. to enter the lists against Klabin and then the defendant wrongfully turned around and knowingly gave Klabin an insuperable advantage.

The defendant likewise misreads plaintiffs' prayers for relief. First, plaintiffs seek to restrain the defendant from granting clearance to Klabin to incur additional indebtedness because this would directly and immediately harm the plaintiffs. Secondly, plaintiffs allege that the defendant has already "over-loaned" in the pulp and paper industry in South America and should be restrained from further lending for the term of plaintiff Lutcher S.A. loans. This is logical, reasonable and necessary relief. Finally, plaintiffs, in order that these primary measures of relief can be enforced, seek to restrain the defendant from destroying records or removing persons or funds *unless* the defendant, its agents, officers and employees retain a record thereof. This does not mean that defendant's operations are, as it claims, "stymied". Defendant can operate but it should be possible to determine if such operations are inconsistent with the court's decree. Since this court will retain jurisdiction pending this action and thereafter to the extent necessary to ensure compliance with the court's decree, such prayers are clearly in order.

Conclusion

The concluding paragraph of defendant's Memorandum states, page 26:

> "These institutions operate pursuant to an agreement to which the United States is a party, and manage billions of dollars of resources, a large portion of which have been contributed by the United States."

Plaintiffs submit that this adds another ground, one of public policy, for this court to enjoin the defendant from perpetuating and compounding its prior errors. In short, the plaintiffs contend that defendant has already made one error—witness the agreement dated June 9, 1965, between defendant and Klabin (Appendix III to Upton Affidavit)—and unless restrained, it will in the guise of correcting its earlier mistake make another error detrimental to the plaintiffs and to the taxpayers of the United States. Briefly stated: "Two wrongs do not make a right."

Citing *Conley* v. *Gibson,* 355 U.S. 41 (1957), Barron and Holtzoff, *Federal Practice and Procedure,* Vol. 1A, Section 356, p. 361, state:

> "The United States Supreme Court has endorsed 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "

This rule has been applied by the Circuit Courts of Appeal and District Courts in a multitude of cases. See Barron and Holtzoff, supra, Vol. 1A, Section 356 and the numerous case citations in footnote 92 at page 361.

The United States Court of Appeals for the District of Columbia, in *Callaway* v. *Hamilton National Bank of Washington* (1952), 195 F. 2d 555, declared at page 559:

> ". . . we must observe the usual rule that on a motion to dismiss, the plaintiff's allegations are to be taken as true and all reasonable favorable inferences arising therefrom are to be indulged."

In that same case, the court went on to state:

> "A motion to dismiss should not be sustained 'unless it appears to a certainty that the plaintiff would be

entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff."

See also *Dollar* v. *Land,* 81 U.S. App. D.C. 28, 154 F. 2d 307, (C.A.D.C., 1946) affirmed 330 U.S. 731.

The plaintiffs have alleged sufficient facts to state a claim by virtue of the contractual relations of Lutcher S.A., in which F. Lutcher Brown is the principal shareholder and a creditor, and the defendant. The plaintiffs sufficiently allege that the defendatnt has breached its duty not to hinder or obstruct another party in the performance of a contract, and that the plaintiffs have standing to maintain this action. It is clear as a matter of law that the defendant is not immune from suit.

The Motion to Dismiss should therefore be denied and plaintiffs' Motion for Preliminary Injunction should be granted.

Respecftully submitted,

WILLIAM W. RAYNER
William W. Rayner
1032 Shoreham Building
Washington, D. C.
Attorney for Plaintiffs

Of Counsel:

WHITLOCK, MARKEY & TAIT

Dated: March 21, 1966

Washington, D. C.,
Friday, March 25, 1966

The above-entitled cause came on for hearing before the Honorable Oliver Gasch, United States District Judge, on motion to dismiss and motion for preliminary injunction at 10:15 a.m.

Appearances:

For the Plaintiffs:

William W. Rayner, Esq.

For the Defendant:

William D. Rogers, Esq.

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2 PROCEEDINGS

The Clerk: Lutcher, et cetera, versus Inter-American Development Bank.

Mr. Rayner: May it please Your Honor, my name is William Rayner; I represent both plaintiffs in this action, which is a complaint for injunction and for damages.

This morning there is before the Court our motion for preliminary injunction. With the Court's indulgence, I would likke to summarize some of the pertinent facts before taking up the principal part of our motion, although there is extensive factual matter set forth in the complaint.

The plaintiff, Lutcher S. A.—

The Court: Before you get started perhaps it would be helpful to you if the Court indicated to you the difficulty he is confronted with in analyzing your position. Do you take the position that by making a loan to your client the bank is required to give him what amounts to be a monopoly in this field?

Mr. Rayner: Not at all, Your Honor. Not at all. Essentially we are contending that the defendant having given a loan to our client, and entering into a contract with him, has the duty to act prudently, to consider the interests of our client, in any further action that the defendant might take.

3 Now, the defendant is engaged in lending money for development purposes. This is set forth in the Articles of the bank establishing it. The Articles also require the bank to cooperate with private sources of investment—and my clients are private sources of investment—in a development project. The plaintiffs and the defendant are more in the nature of joint venturers than the typical kind of commercial bank and borrower relationship.

This bank lends money, and this is set forth in its Articles, only when adequate financing from other sources is not available. Now, this means that a potential borrower, that comes to this bank, says We have an idea for a project in a remote undeveloped area that will foster economic development. That is within the functions and purposes of this bank. And the bank, after extensive study, may or may not enter into financing with that potential borrower.

Now, Lutcher S.A. was the first private client, the first private borrower of this bank. It was the second loan made by this bank, in 1961. Late in 1961, when the group that we will refer to as the Klabin group came to the bank, the plaintiff Brown was advised by the bank that the Klabin group had approached them for a loan and Brown said, before you do anything, you must consider carefully the market for this kind of pulp.

4 The bank proceeded to study the matter of the Klabin proposal. Brown came to Washington. He pointed out to the representatives of the bank a fundamental weakness in the market data upon which the bank was relying. The bank indicated to him that nevertheless it was too late, that a moral commitment had been made, and the bank proceeded to lend the Klabin group five million

dollars. The loan was made in January of 1962. That project still has not been built.

Now, four years later, the Klabin group has come back to the bank and said, in essence, we need to raise still further money to complete this project.

In June of 1965, the bank and the Klabin group entered into an agreement and this agreement was filed by the bank, as part of the affidavit of Mr. Upton, in which they recite that the Klabin group has not executed the project as they were required to do, and the bank obtained the right to sell the machinery that the Klabin group had acquired with the loan of funds.

Now, again, when Brown learned that the bank was considering this proposal, current proposal of the Klabin group, Brown again came to the bank and said, You must look at the market. If you look at the market objectively, you will agree with me that there is not an adequate market to support two enterprises of these sizes.

In December of 1965, when Lutcher S.A. had a loan payment due of approximately $470,000, Brown proposed to the bank that the bank defer that payment and the bank use $45,000, still undisbursed, under a second loan to Brown, the bank use that money to pay for an independent study of the Lutcher project and the market. The bank agreed to those suggestions, in January of 1966.

The Browns went out, they raised more money, they borrowed money, Lutcher S.A. borrowed money. They made the December payment.

In January of '66 the bank said we will make this study. We will submit to you proposed terms of reference for such a study. We will submit to you the names of firms that we suggest make the study. And then you may come back to us and add to the terms of reference or suggest other firms.

We repeatedly asked the bank for those terms of references and approximately a month went by, until late February 1966, when the bank gave us the terms of

reference and there was not one mention of a market study. And this was crucial to the Lutcher project. Because what the bank, very simply, is preparing to do is to foster the growth, to finance two competing units when there is room for only one. We contend that this is contrary to the purposes of the bank, and detrimental to our interests.

6 The Court: But you have a political question here. You don't have a question for the courts to decide.

Mr. Rayner: Well, Your Honor, the Articles of Agreement establishing the bank state, and this is in Article VIII, Section 85(f), and I quote:

The bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article I.

End quote.

The Court: Who makes the economic determination?

Mr. Rayner: The staff of the bank.

The Court: How can the Court interfere with the economic determinations of the bank?

Mr. Rayner: A court can interfere, Your Honor, because Article XI, Section 3, of the Articles establishing the bank, states, quote:

Actions may be brought against the bank only in a court of competent jurisdiction in the territories of the
7 member, in which the bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.

Close quote.

Now the Articles of the bank state that the principal office of the bank shall be in Washington, D. C.

The Court: Assuming this Court has jurisdiction of a suit—and that is subject to considerable question in the Court's mind, particularly if you read the next paragraph.

Mr. Rayner: The next paragraph—

The Court: In view of the two Executive Orders, one by President Eisenhower and the other by President Kennedy, there is considerable question in the Court's mind about jurisdiction to entertain any suit. But assuming for the purposes of argument that this Court does have jurisdiction to entertain suit, is this the type of suit, is the subject matter of this suit justiciable? It seems to me that what you are dealing with here is whether or not the judgment of the bank can be modified by the Court. The Court doesn't know anything about economic conditions in South America or whether two paper mills are proper or whether only one is proper. That is why the Court asked you the question at the outset, are you contending that the bank by making a loan to your client has guaranteed a monopoly, in so far as construction and operation of paper mills in South America are concerned. I have a grave question about that.

Mr. Rayner: No, sir, and we don't contend that.

The Court: What is your position? Are you saying that they should not lend money to Klabin?

Mr. Rayner: Your Honor, as far as we knew, until yesterday—it appeared in the New York Times, apparently they are going to lend additional money. Up to that point and when this suit was filed, we were under the impression and the understanding that what the bank was faced with, the decision of the bank, was whether to allow Klabin to incur additional indebtedness. Under the long contracts with all borrowers, at least with us, and I think with Klabin, the bank says you will not, without our permission, incur long-term indebtedness in excess of X dollars. Klabin, we know, is out trying to borrow more money and he has come back to the bank and said, Bank, modify my contract with you and give your permission for me to take on this

additional indebtedness. We say that if the bank does that, the bank will then be compounding and perpetuating the initial error they made when they made this loan in the first place.

Now, as for—

The Court: What standing does one client of a bank have to come in and ask the Court to grant an
9 injunction respecting another client of the bank and the bank, and their relationship?

Mr. Rayner: A contract, Your Honor.

The Court: What terms of the contract permit you to draw the inference that the bank may deal only with your client and may not deal with another client?

Mr. Rayner: Consider this, Your Honor. The bank insisted—

The Court: Is there a section of the contract that goes into that?

Mr. Rayner: There is no section.

The Court: You talk about implied contract?

Mr. Rayner: Yes, sir.

The Court: I wish you would develop that.

Mr. Rayner: Fine.

In the contract of June 1961, between the bank and Lutcher S.A., the bank insisted upon inclusion of a provision that within seven years from the date of the contract at least 25 per cent of the ownership of the company, of Lutcher S.A., had to be in the hands of members of the public other than the then present principal shareholders, namely, F. L. Brown. This requires this company and Brown to sell within seven years 25 per cent of this company.

Now, with a condition of oversupply of pulp, with
10 these two mills coming into existence in Brazil, as Brown has gone out and tried to sell this interest in his company, the potential purchasers have asked, what is going to happen with Klabin, if there are going to be two of you and there is room for only one, then we are not going to gamble on which one it is going to be.

Now, what the bank is doing, is making it impossible for Brown to comply with one part of the contract. Now, if this situation comes about, if the bank proceeds with this action, which we contend is imprudent, improvident, and with a complete disregard for the position of Lutcher S.A., this plant, that has been built with approximately $8.7 million of the bank's money, and at least that much, possibly double that of Brown's money, will be standing in the middle of nowhere, approximately 90 miles from the town of Guarapuava, which is the nearest principal city, with a population of 5,489. There are hundreds of homes, two schools, a hospital, churches, roads, forests; no one will come in and buy this plant if the Klabin thing proceeds, because there is not enough room for the two plants.

Now, as for monopoly, we have said to the bank, and only this week I again said to the bank—the bank filed on March 14 in this Court their agreement with Klabin of June 1965. This was the first time that we knew of this agreement. It attaches an annex listing equipment. Now, Brown has been saying to the bank, Don't treat Klabin, who has not completed his project and owes you two million, with a five million, don't treat him separately, don't treat me separately. We are both in Brazil, we are both in the pulp business, look at us in context. This is what the market study was supposed to do that the bank reneged on their agreement with us to do. We are in a position to say to the bank, and I suggested this the early part of this week: Some of the equipment which is in storage in Europe, that Klabin purchased, could be added to the standing Lutcher plant. It could make this plant, it could help toward making it an economic, feasible unit. Lutcher S.A. will buy it, with shares, from Klabin. Let Klabin come in as a partner. Lutcher S.A. will go out and try to interest other paper companies, pulp companies, to come in as well, and the present management of Lutcher S.A. will withdraw. They will simply be owners and partners with the Klabins and any others. And we say, Bank,

this would solve your problem with Klabin, it would solve your problem with us.

I suggested to counsel for the bank that we have a meeting. I called him, I think it was Tuesday of this week. He told me he would have to check with his client, he would let me know. I phoned on Wednesday for a meeting on Thursday, yesterday, and I was advised that the bank was unwilling to discuss this.

Now, Your Honor, what we have been saying to the bank, and which for some reason we cannot understand, the bank has refused at least to acknowledge to us that they are taking a rational, reasonable approach to these problems. Now, as a further indication of that, in an article that appeared in the New York Times yesterday—and this, too, was news to us. And this must have come from a source in the bank. It did not come from us. Last weekend, the bank was understood to have agreed to reschedule the repayments of three million dollars of its loan, that is, with Klabin, and to make available an additional two million dollars, pending the outcome of an independent study of marketing conditions.

Now, Your Honor, this is not the usual way that a bank operates. They don't make the understanding or make the agreement and then make the study. The rational, reasonable approach would be to study the market, to study the conditions, and then make the agreement. They are getting themselves into the same position they got into in 1962 when we pointed out the error of what they were about to do and they said it is too late, we have a moral commitment.

Now, a court is the only place that we could come for protection in this situation. In this case, Your Honor, I submit that this is more than a matter of discretion that should be left entirely to a bank. A bank is not sacrosanct. Its decisions are not above question. Many times this Court has had complicated antitrust questions, where it had to determine questions just such as this: market, delineation of market, definition of the market,

affect on competition, lessening of competition, restraint of trade. The United States District Courts have for many, many years dealt with these complicated economic questions, and are perfectly capable of doing so in this matter.

In addition, I would like to call to the Court's attention something that came to my attention late last evening in the front part of the same issue of the New York Times, on page 30. It is an article to the effect that the Colorado Supreme Court has invalidated a certificate to a Public Power Cooperative. The Administrator of the Rural Electrification Administration states this will mean the future of rural electrification in Colorado has been placed in critical jeopardy.

Now here is a plant, a $31 million plant, to which REA loaned $21 million. The plant is built. It is operating, it is running. But the Supreme Court of that State has invalidated a certificate, and quoting from the newspaper, the court said there was no need for the new plant, because the plaintiffs, the Public Service Company of Colorado and Western Colorado Power Company, were, quote, ready, willing and able, close quote, to supply increased needs of the Cooperative's members if necessary, close quote.

Now I recognize, Your Honor, that we are somewhat different in that right now this plant of ours is not operating, because of market conditions, because of difficult economic conditions in Brazil. But it could operate, Your Honor. The assets are there and in place. The people are there. The trucks are there. The trees are there.

Now, what has happened to Lutcher S.A.? Lutcher S.A. got its loan in June of 1961, its first loan. The preceding October, October 1960, Mr. Janio Quadros was elected President of Brazil and Mr. Joao Goulart, Vice President, for a period from 1961 to 1966. Mr. Quadros, in his public statements, committed himself to correcting the economic and financial conditions existing in Brazil.

In August 1961, approximately two months after Lutcher S.A. got its loan, Mr. Quadros resigned. Mr. Goulart, the Vice President, was out of the country. There was great internal upheaval. There was some talk that Mr. Goulart would not be permitted to return and become President. Economic conditions deteriorated rapidly in Brazil.

In 1962, when Lutcher S.A. began to draw down what was called the cruzeiro part of the loan, $2,200,000 in cruzeiros, converted at the free market rate, the monetary authorities in Brazil, because of the spiraling inflation and difficult conditions, fixed the rate of exchange. And what this meant was that when Lutcher S.A. took out one loan dollar from this bank in Washington, in Brazil they got 300 cruzeiros. But that was at the fixed rate. And that it what they got, 300 cruzeiros. But the free market rate was 400 or 600 or 800.

Now, we went to the bank and we said: Bank, this is terrible. We can't build this mill. We are not getting as much money as we contemplated or you contemplated.

The bank said, a fair and equitable solution will be found.

And we talked for months, and the bank representatives gave to us approximately four solutions and said, we are ready to do one or more of these. And I had Mr. Brown come up from Brazil to determine which of these he would utilize, which would be most useful. When he got here we went to the bank. The bank representative said: Nothing. You get nothing.

So we instituted arbitration against the bank. And the arbitration tribunal determined that we were right. And the bank, instead of paying an award, suggested a second loan. And the bank thought and we thought that perhaps this would help us to make the plant run more efficiently, at lower costs, and we could hang on to this thing. And so Brown took the loan and

he went ahead. I daresay, however, this did not make Mr. Brown very popular in the bank.

Now, I have already described to the Court what has happened in late 1965. Brown and Lutcher S.A. have had tremendous difficulties in Brazil and inevitably this has caused some difficulty with the bank. But the critical thing, when it came to the point where Brown and Lutcher S.A. had no money to make the payment and they suggested to the bank this objective study, the bank first agreed to it, and then rejected it.

But with Your Honor's permission, I would like to read a very brief excerpt from the 1965 Britannica Book of the Year, page 196. And this is talking about the spring of 1964. Your Honor will recall that in 1961 one president resigned, and there was great upheaval and Mr. Goulart did come back and he was President. He was President until 1964. In 1964, in April, Mr. Goulart left Brazil. The military in the country were becoming very concerned with the direction toward Communism that Mr. Goulart was taking. They feard that the Government would drift into Communism or be led into it, and Mr. Goulart left the country. Now, this is what the Britannica Book of the Year says about the new Administration:

The problems confronting the new administration were staggering. The new president at once appointed the members of his cabinet and, among other important measures, implemented the Institutional Act by creating a general committee of investigation with six members. The economic and financial problems received his preferential attention. Roberto de Oliveira Campos was appointed minister of economic planning with the duty of preparing and submitting a plan for the economic reconstruction of the country.

Inflation was one of Campos' principal targets. Prices rose 22.4 per cent in the first quarter of 1964, but only rose 14.2 per cent during the second quarter. The minister

expressed hopes that the rise would not be higher than 70 per cent for the whole year. As a means of reducing the deficit in the balance of payments, the foreign exchange subsidies for wheat and petroleum imports were cancelled. This measure was said to have saved the country about $200 million per year.

Meeting in Paris with the Brazilian representatives, the main creditors of Brazil, at the urging of the United States, agreed to recommend that 40 per cent of Brazil's debts (falling due during the next two years) be carried over until 1967 and then paid off during a period of five years. At the same time the United States announced a grant of $90 million for the Food for Peace program in Brazil with a new $50 million loan to support the value of the cruzerio.

Now, in late 1964, in the middle of 1964, these were the conditions in Brazil and the new Government came in and they imposed strict economic measures. These measures were logical and they were necessary and they were implemented for the benefit of all of the people of Brazil and they were right. But they could not have come at a worse possible time for this new project, Lutcher S.A., which was just starting up. They needed to give their customers credit and they needed to have credit from their suppliers. But credit was severely restricted.

When Lutcher came to the bank and he said conditions are terrible, there is no market for pulp, we talked with the bank and we talked and we talked, and finally we came to this agreemet that this study would be made. The bank, incidentally, was saying, well, it's your fault. There are things wrong with Lutcher, S.A., you don't have the right equipment, or you are not doing this right. So we said, Look, let's make a study of Lutcher, S.A., which you contend is the problem, and the market, which we contend is the problem. First, they agreed. And when they did agree the Browns borrowed more money and Lutcher S.A. borrowed more money and they put it in relying on the

fact that this study would be made, which, done by an independent firm objectively, would show that there
20 is not an adequate market for these two firms.

Now, Your Honor, this article in the New York Times of yesterday, on page 61, states—and, again, this must come from within the bank:

The question of marketing conditions for paper pulp in Brazil has been the subject of a long debate in the bank's board of directors. There was a month long delay in giving new support to proposal—

that is the Klabin group—

and to reported expressions of anger from the Brazilian Government which has guaranteed the project.

Now, Your Honor, this indicates that there must be people in the bank who have the same serious doubts and fears that we have, as a borrower with a contract with this bank.

Your Honor, I would like to touch very briefly—we have already discussed the subject of immunity. We contend that Article 11, Section 3 of the Bank's Articles state, actions may be brought against this bank where the bank has an office. And, incidentally, Your Honor, the bank is a party in some three other actions in this very court. In Civil Action 3202-65, 808 Coffee Shop, Inc. v. Inter-American Development Bank, complaint for damages and injunctive relief arising out of breach of contract.
21 Complaint was filed December 22, 1965 and the answer of the bank was filed February 1, 1966. Civil Action 2860-65, Margaret Schutz v. Ship Shape Maintenance Company and Inter-American Development Bank, complaint for personal injury. The lady fell in the bank. Complaint was filed November 15, 1965 and the answer of the bank was filed December 6, 1965. In Civil Action No. 2267-64, Commercial Insurance Company of Newark, New Jersey v. Red Coats, Inc., complaint was filed December 14, 1964, by the insurance company in its own

right and as workmen's compensation carrier for the bank.

The Court: What was the first cause of action?

Mr. Rayner: The 808 Coffee Shop, Inc. had a contract with the bank. It was the assignee of a contract entered into, previous party in the bank, to operate a coffee shop in the building 808 Seventeenth Street, owned by the bank.

But even more significant, Your Honor, in the agreement with Klabin, dated June 9, 1965, which the bank evidently determined pretty much since they were in a position of calling the loan with Klabin, this agreement signed by the bank states that any dispute arising under the agreement will be submitted to arbitration, but the arbitration tribunal shall be governed in its evaluation of the facts and its legal conclusions by the law of the District of Columbia, United States of America. Now, inevitably, such a provision in a contract involves the courts of this jurisdiction. If it went to arbitration, this Court might well be called upon for declaratory judgments. This Court might be called upon to review the action of the arbitration tribunal, whether there was fraud, mistake, et cetera. This Court would be called upon to enforce the award.

The Court: Have you sought arbitration of your present controversy?

Mr. Rayner: Not of the present controversy, Your Honor, for this reason.

The Court: Why haven't you?

Mr. Rayner: Because, Your Honor, we felt that arbitration would not provide the protection necessary. If we had submitted a letter, a notice of arbitration to the bank, the bank might very well have received that letter on one day, taken the action with respect to Klabin the next day, and then the whole thing would be moot, except for the possibility of trying to determine damages. But even then, damages would not cure us if this entire plant is left standing there and all of these people are unemployed and stranded in this area.

There is a procedure, Your Honor. If the bank
23 wished to take this matter to arbitration, if the bank wished to try to take us out of this court, there is a procedure. But they haven't taken it. Now, I speculate the reason that they have not is because they do not want to dispute this issue with us at any time in any forum. We have no other recourse but to come to this Court for an injunction. To require us to resort to arbitration, which would not give us the protection of this Court, would be depriving us of the right to seek recourse in courts. And, as I am sure Your Honor is well aware, the courts have always frowned upon efforts to deprive persons of their access to the courts for protection and relief. Arbitration for many, many years was not recognized by the courts. This arbitration would not provide us with the protection that is needed in this situation.

Now a motion to dismiss, I am sure I need not point out to Your Honor, has the effect of admitting our facts. In addition, the defendant filed a document called memorandum in support of motion to dismiss and opposition to motion for preliminary injunction. Now, if they were going to oppose our motion—

The Court: That is standard operating procedure, in my experience in this court.

Mr. Rayner: Why did they not dispute any of the
24 facts that we have alleged? Mr. Upton—

The Court: A question of whether your complaint states a claim.

Mr. Rayner: Well, under a motion to dismiss, the most favorable—

The Court: I understand.

Mr. Rayner: —inferences should be given to the complaint.

The Court: But you have got to state a complaint.

Mr. Rayner: Yes, Your Honor. And of course that is one of the issues before the Court, that we are arguing about here this morning. But we submit that very clearly

we have a right under two contracts with the bank. The bank cannot interfere with a contract that they have made with us. The fact that this is a bank does not make this sacrosanct. What the bank is arguing here is the principle—

The Court: What is it in the bank's contract with you that has been violated to the extent that you now say you have a cause of action against the bank?

Mr. Rayner: The thing in the contract that has been violated is the implied obligation.

The Court: You see, you are dealing with something other than the contract when you are talking about an implication.

25 Mr. Rayner: But I submit, Your Honor—

The Court: What language is there in the contract that gives rise to an implication?

Mr. Rayner: There is language that the borrower is required to execute and complete this project. What the bank is doing is hindering us in doing that. The borrower is obligated to repay the loan. If this project can't operate successfully in an inadequate market, they can't be paid the loan. The borrower is obligated to sell 25 per cent of the company to persons other than the present principal shareholders, which they cannot do because of the actions of the bank.

This action of the bank, in preventing us from selling 25 per cent, puts us in position of default, where the bank can foreclose on a mortgage, on the entire plant property, and the trees of the borrower. And this is in any contract, I submit, Your Honor, whether it is with a bank, whether it is with a lawyer—a lawyer cannot do for one client an action detrimental to another client. The United States Government in construction contracts cannot frustrate or hinder the contractor in performing. The Government has been sued many, many times on this. The United States Government has admitted in the Court of Claims Act

26 it can be sued on contracts. The Federal Claims Act says it can be sued in tort.

The Articles of this bank do not say we can be sued only by bondholders. It doesn't say that. They have been sued by a coffee shop. They have been sued by a lady. We have sued them. There is nothing unique about a bank. Now, there is nothing unique about—

The Court: You say there is no distinction between these personal injury cases and the coffee shop case and a case of this kind which involves broad financial policy, political and economic considerations, international in scope? You say there is no distinction between that?

Mr. Rayner: I make the distinction on this, Your Honor: I concede that there are differences between the cases, but a government cannot be sued by a coffee shop. A government cannot be sued by a lady who falls in an embassy.

The Court: Under the Federal Tort Claims Act?

Mr. Rayner: No, sir. Sovereign—foreign government is immune from suit.

Now, in a very old Supreme Court case, which is in 4 L. Ed., the Supreme Court said of consular officials, consular officials engage in commercial activities, they impose claims for members of their country, citizens, and
27 the Court says, they do not carry out diplomatic functions. They do not validate the prerogatives of their sovereign. They do not engage in political determinations. This is the heart of the immunity provisions, the diplomatic character, the political character of the activities. This is why ambassadors are immune and why the property of the embassies is immune, because of their diplomatic, their political activities and characteristics.

But here the bank is like a consular official who engages in commercial type activities. Indeed, the Articles of Agreement of the Bank which I read a moment ago said only economic conditions shall prevail—economic—and that is what we are talking about in this suit. Not political.

The Court: All right. I will hear from Mr. Rogers.

Mr. Rayner: Thank you, Your Honor.

Mr. Rogers: May it please the Court, my name is William Rogers, law firm of Arnold & Porter, and I am here representing the bank.

We have, as you know, filed a motion to dismiss the complaint and we seek, if Your Honor please, dismissal as quickly as is convenient. This is a serious business. There is a great deal of money involved here; a large number of judgments, discretions, political considerations involved in this matter. But the pendency of this lawsuit, I must say, obscures and somewhat qualifies the sense of freedom on the part of the bank and its staff to make the proper decisions with respect to the two borrowers who stand before it.

28

It seems to us, Your Honor, that the case involves essentially the issue whether the bank's affairs and its judgments are to be removed from the board room to the courtroom. The plaintiff's cause of action is based primarily on the notion, as we understand it, that the bank must act prudently, which of course it must; and he seeks for purposes of enforcing a standard of prudence a drastic remedy of an injunction.

Our position is that that suit will not lie, will not lie under any interpretation or theory of the facts, the complaint should be dismissed.

The facts in the case are very simple, as you know. The bank did make a loan in 1961 to the plaintiff. The plaintiff now contends that the bank must be prohibited from permitting under another loan agreement, with Klabin—a third party, not a party to this lawsuit—the bank must be prohibited from granting Klabin permission to expand, and his capacity to compete with the plaintiff.

The Court: Is Klabin an indispensable party?

29

Mr. Rogers: I should think he might be, Your Honor. In fact it seems to me that the party with the most particular interest here, that is to say Klabin, is not present in any sense. We of course, as you know, take a position which hopefully would avoid the necessity for

the Court to reach that issue by suggesting that the complaint should be dismissed in any event. Klabin, however, is the object or target of this lawsuit. There is no question about it. And the plaintiff, it seems to us, is using this Court to get at the bank in order to reach Klabin, and to avoid the possibility that Klabin's position in the pulp market in Brazil will be strengthened.

It seems to us, Your Honor, there is everything against this lawsuit, all kinds of public policy considerations both here and Brazil, all kinds of sensitive international relations, political relations, Congressional involvement, State Department and what have you, as well as the integrity of the bank. And hence, the complaint probably should be dismissed at Your Honor's earliest convenience. It seems to us there are two major avenues to that result: First, relates and revolves around standing, to the extent of which there is a cause of action presented by this complaint wholly and separately apart from the special question of immunity of the bank under the International Immunities Act and other bodies of law. It also seems to us with respect to that first issue of standing and cause of action, Your Honor, that the facts of the case, essential issues in the case, can be effectively revealed by stripping it of some of the special considerations.

This seems to us to stand on precisely the same footing, if you will, Your Honor, as a suit which might for example be brought by General Motors against the Chase Manhattan Bank. Assume, for example, that the Chase had made loans to both GM and Ford. Assume that Ford thereafter under its loan agreement with the Chase asked the Chase for permission to expand its indebtedness and the General Motors then was minded to bring an injunction suit against the Chase Bank in order to enjoin it from allowing the Ford Motor Company to expand its debt, improve its plant and appear on the market as a more effective competitor. This seems to us palpably to state no cause of action on the part of General Motors.

A bank's judgment as to how it will lend and which of its clients it will grant permission to is clearly a matter which does not raise a cause of action on the part of another client of the bank.

I think the issue is further strengthened by the
31 fact we are really not dealing here with a situation such as a fight between General Motors and Ford over the automobile market in the United States but rather one, for example, over the automobile market of France. The market that is involved in this case is not a market within the United States and the public policy with respect to that is clearly Brazil public policy and not the policy of the nation of which this Court is a representative.

I think for this sort of suit to stand, even in the private banking field, separate and apart from the question of political unity, obviously raises profoundly serious questions with respect to the capacity of a bank to continue to administer its affairs and it would mean, I think, if Your Honor please, the bank would operate thereafter at the sufferance of their creditors and of the capacity and willingness of their creditors to bring injunction suits. And I think that the danger of that kind of notion is particularly distressing when one considers the possibility not merely, for example, suit by this particular plaintiff against the bank, but a suit by Klabin in the courts of Brazil. If this particular plaintiff has a suit based on the notion that the bank has an obligation to act prudently with respect to

him, by the same token Klabin must also have a
32 cause of action that the bank has an obligation to act prudently with respect to Klabin. He could easily allege that the market is many times what the plaintiff in this lawsuit claims it is and therefore the bank not only has the obligation of prudence but the obligation of its own charter to develop that market and hence to grant him the permission as an act of prudence to incur the additional indebtedness which the plaintiff here seeks to bar.

I submit, Your Honor, if there are such causes of action in plaintiffs who happen to be clients of a bank, private or public, possibility of conflicting lawsuits and conflicting injunction with respect to acts of discretion of bank is very real, and very important.

Furthermore, of course, as Your Honor knows, this happens to be not merely an ordinary bank but a bank which is enforcing and carrying out the public policy of effective international development. It of course does have an obligation to act prudently. It has an obligation to act prudently for the purpose of expanding and improving the economic and social development of the nations of Latin America, including the nation of Brazil. Its action is affected and the success of its work is qualified or improved,

as has been brought out in the court already today,

33 by an inordinate number of complex considerations:

political developments in the country; the market analyses, which itself is a highly complicated economic problem, particularly when it involves foreign nations; the relevance, for example of the market in Brazil for pulp to the market in Chile for pulp, and the production in the various countries of pulp, and the relationship or lack of relationship; the effectiveness of competition or lack of competition between various countries within Latin America. It must make judgments with respect to management and the effectiveness of the management of the various borrowers who come to it. And finally, and most important, as illustrating I think the complex public issues which the bank must consider, is the question of what international developers now call programing judgments, which in effect means, Your Honor, the consistency of a particular loan project with the national priorities established by the nation in which the project is going to be undertaken, in this particular case, Brazil.

It is obvious, Your Honor, that a banker's life, an international developments banker's life, is not a happy one. As Mr. Black, president of the World Bank, has

said, an international development banker, such as the staff and officers of this particular bank, is engaged in kind of development diplomacy. It is perfectly obvious also that the responsibilities of that job and the difficulties of that function are both those of development and of diplomacy. The nations of the hemisphere have given this bank a very heavy responsibility. It is, if you will, the bank of alliance of progress. It has been so called. It seems to us, Your Honor, that this bank, more obviously even than in the case of private banks, must have freedom of discretion, freedom of judgment to match that heavy and difficult responsibility.

It is for this reason, Your Honor, we have contended that the plaintiff in this case has stated no cause of action to enjoin the bank in the exercise of its judgment with respect to Klabin's alleged request for permission to incur additional indebtedness and expand his capacity to compete.

The second avenue I think, Your Honor, to the disability of this suit has to do with the special bodies of law relating to immunity of the bank. I refer you, Your Honor, to our brief which sets these out at some length. I think, however, that I would emphasize, it seems to us, that the general attainment and the result of these bodies of law, relating to the immunity of the bank, are really the product of the fact that the bank itself is a creature of international agreement. The various nations who decided to establish this bank also engaged themselves to a kind of mutual self restraint.

Let us say that the bank which they were creating was to be not subject to the review and its judgments were not to be subject to review and interpretation of the courts of Brazil, Guatemala, Mexico, or of this nation, and that the pull and tug of national interests which would determine whether the bank would make a loan or not make a loan, the pull and tug of national interests which would determine whether the bank would, for example, grant Klabin permission to expand its indebtedness and capacity to com-

pete, that pull and tug of national interests would occur in the board room and not in the courts of Brazil, of Mexico, or of the United States.

It seems to me the perfectly obvious intention and result of the Articles of the bank, which discuss of course the immunity of the board members, the immunity of the officers, the privilege of the communications within the bank, the inviolability of the archives, the immunity of the appropriation and what have you.

The Court: On this point, Mr. Rogers, may I interrupt to ask you for a little clarification between the
36 two Executive Orders, that of President Eisenhower and the later one of President Kennedy, on this subject of immunity. Would you give me your interpretation of the Kennedy Executive Order on this subject?

Mr. Rogers: Yes. I think basically the Kennedy Executive Order, which, if Your Honor please, I would not represent to you as a model of clarity.

The Court: I would agree with you on that.

Mr. Rogers: The basic purpose of the Kennedy Executive Order was to track the provisions of the Executive Order with respect to the world bank. I believe that that is cited in our brief, Your Honor. But in any event it is Executive Order 9751 of President Truman, dated July 11, 1946, which contains, curiously enough, in one Executive Order, all the provisions which eventually got into the IDB Executive Order as a result of the Kennedy addition to the Eisenhower Order. I am afraid I didn't say that very clearly, Your Honor. Therefore, the intent of what was done by Kennedy, in his Executive Order, was to make the situation with respect to the Inter-American Development Bank the same as that with respect to the World Bank. And the result of the addition was, I think in both cases, to make it perfectly clear that the bank was subject to suit in a case of bondholders and other common garden
37 variety of lawsuits, but that it was not to be subject to suit with respect to matters involving economic policy and judgment and discretion such as this case.

It is for this reason, Your Honor—these two reasons, basically—that we urge upon you our motion to dismiss. It seems to us, if I may represent to the Court, that this case does contain a seed, an important seed of a threat to the bank integrity in its sense of responsibility. We believe that the continued pendency of this suit will cast, if you will, a cloud on the bank's discretion and judgment in these difficult and sensitive matters, and hence we have asked the Court to give this motion priority consideration.

The Court: Thank you, Mr. Rogers.

Would you like briefly to reply to that?

Mr. Rayner: If I may, Your Honor, very briefly.

The Executive Order, and we quote this in our brief, specifically states that such deciding nations of the bank as an international organization shall not be construed to affect in any way the applicability of the provisions of Section 3, Article XI of the Articles of Agreement of the bank. End quote.

And it is Article XI, Section 3, of the bank which says that actions may be brought against the bank.

38 The Court: You read that first paragraph before.

But it is the second paragraph that is important, I think, perhaps.

Mr. Rayner: Yes. The second paragraph right here?

The Court: I don't know what you have before you. I have previously read it.

Mr. Rayner: We say that the Executive Orders leave untouched, unaffected, the provision that the bank may be sued which is in its Articles.

The Court: May be sued, as the Court indicated previously to you, in certain cases. I am not so sure that does cover matters of economic policy and matters of judgment and discretion. You pointed out three suits here in the District of Columbia. They obviously do not involve economic policy, judgment and discretion. Someone who falls in the lobby of the bank or someone who thinks he has a coffee shop license with the bank and that kind of thing, the Court can understand that type of suit. A bondholder's

suit. But this does involve economic policy and judgment and discretion with respect to the loan to another client who is not before the Court and who certainly is an interested and perhaps indispensable party to this litigation. Now, I don't know that we have to reach that question.

I was impressed by the analysis that your opponent
39 gave of a loan by a bank to two competing auto manufacturers such as Ford and General Motors. What standing would Ford have to come in any say to the bank that had made loans to each of them, "We don't want you to continue increasing your loan to General Motors"?

That is the type of situation we are confronted with here except it is a much more sensitive area.

Mr. Rayner: I would say two things, Your Honor: Number one, if the bank, the Chase Manhattan Bank were going to make a loan to Ford and its General Motors creditor came in and protested this, the General Motors, if the bank proceeded to act imprudently, would have a cause of action against the bank based on implied contract, if—if —General Motors were going to be damaged by this.

We have demonstrated in our complaint that we will be damaged by this action.

Now, secondly, and Your Honor made this point and Mr. Rogers made this point, this bank is not the Chase Manhattan Bank. This bank is a bank formed to foster economic development. They have an even greater responsibility than the Chase Manhattan Bank. All the Chase Manhattan Bank is interested in is profit. If you go and you deal with the Chase Manhattan Bank knowing that
40 they are interested only in profit, then you might be said to have assumed the risk of doing business with the Chase Manhattan Bank. But when a borrower comes to the Inter-American Bank and says we will be a partner with you in the Alliance for Progress, if we will invest our own moneys, and the shareholders of this company have done that, to go into a remote region of Brazil and contribute a plant and roads and employment and schools and hospital to the people of this region, and not take any profit out

for years, but put it back into this business and put it into forests, then, Your Honor, I say this bank has the highest obligation to respect the rights and the position of such a borrower. The Chase Manhattan Bank, the ordinary commercial bank, may not. But we are not talking about a commercial bank here. We are talking about a bank that takes borrowers, knowing that they are entering into great situations of risk. And the stockholders of this corporation need this protection. A bank should not be allowed to take this improvident action.

Thank you, Your Honor.

The Court: Thank you very much, gentlemen.

The Court will take a ten-minute recess.

Order

This matter came on for hearing on defendant's motion to dismiss and plaintiffs' motion for preliminary injunction, and upon consideration of the pleadings and argument of respective counsel in open Court, it is by the Court this 25th day of March, 1966,

ORDERED that defendant's motion to dismiss be, and the same hereby is, granted, and the plaintiffs' motion for preliminary injunction be and the same hereby is, denied.

OLIVER GASCH
Judge

Memorandum

William W. Rayner, Esq., Washington, D. C., for the Plaintiffs.

William D. Rogers, Esq., and Richard B. Sobol, Esq., both of Washington, D. C., for the Defendant.

This cause came on for hearing on plaintiffs' motion for preliminary injunction and defendant's motion to dis-

miss. Plaintiffs seek to enjoin the Inter-American Development Bank from augmenting a loan to one of plaintiffs' competitors. The loan would facilitate the development of a pulp mill in Brazil. Plaintiffs are engaged in a similar business and contend that the market will not support two mills. Plaintiffs further contend that the Bank has ignored certain alleged market conditions and that if consummated, the additional loan to plaintiffs' competitor would not be a prudent act.

Defendant's motion to dismiss is predicated upon two points: (1) the Bank is immune from suit, such as the one filed in the instant case; and (2) the complaint does not state a claim upon which relief can be granted. For the reasons hereinafter set forth, the Court agrees with both of defendant's contentions.

The International Organizations Immunities Act provides, in part:

> "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit in every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." [1]

An Executive Order of President Eisenhower dated April 8, 1960, designated the Inter-American Development Bank as a public international organization which would be entitled to the immunities and exemptions flowing from the above-quoted statute.[2] A subsequent Executive Order promulgated by President Kennedy provided that the first

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[1] 22 U.S.C. § 288a(b).

[2] Executive Order 10873, 3 C.F.R. 404 (1959-1963 Comp.).

Executive Order should not be construed as affecting a certain provision of the Bank's Charter, which provides:

> "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.
>
> "No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, member countries shall have recourse to such special procedures to settle controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank or in contracts entered into with the Bank.
>
> "Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

These pronouncements of executive policy and the Bank's position on its amenability to suit should be considered as important factors relating to the existence of jurisdiction of this Court in the instant case.

The Supreme Court has recognized that sovereign immunity has become part of the fabric of our judicial system through the adjudications of the courts.[3] While there is nothing in the Constitution on the subject, it was early recognized that the dignity and standing of foreign sovereigns could be preserved and maintained by not subjecting them or their agents to the jurisdiction of the United States Courts.[4] When a suit filed in a court of law could conceivably involve delicate matters of international relations, the Courts should recognize that under our Con-

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[3] *National City Bank* v. *Republic of China*, 348 U.S. 356, 358 (1955).

[4] *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

stitution such matters are confided to the judgment and discretion of the Executive Branch of the Government.[5] Plaintiff argues that the Bank has been sued in previous situations: where a customer fell on the floor,[6] where there was an alleged breach of a contractual relationship with a coffee shop,[7] and where workmen's compensation was involved.[8] However, situations comparable to the one in which the Court is confronted are clearly distinguishable for the reason that cases involving the discretion and judgment of the Bank's governing board in matters of economic policy closely associated with consideration of international politics are vastly different from cases involving simple torts and contracts. Where delicate, complex issues of international economic policy are involved, jurisdiction should be denied.

Assuming *arguendo* that this Court does have jurisdiction, it is highly questionable whether even a domestic bank could properly be sued by one of two competing customers who allege that the Bank had imprudently loaned money to the second customer and thereby made more difficult the customer's obligation to respond. Here, it is clear that the situation with which the Court is confronted in this complaint is even more lacking in merit in the judicial sense. Plaintiffs' standing to raise the issues on which they rely is by no means established irrespective of the foreign policy consideration.[9] Counsel does not urge that there is any clause of the contract between plaintiffs and the Bank which specifically concerns the matter of limiting possible competition. He relies on implication. The con-

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5 *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

6 *Schuts, et al.* v. *Ship Shape Maintenance Corp., et al.*, 2860-65.

7 *808 Coffee Shop* v. *Inter-American Development Bank*, 3202-65.

8 *Commerce Insurance Company of Newark, N.J.* v. *Red Coats, Inc.*, 2267-64.

9 *Alabama Power Company* v. *Ickes*, 302 U.S. 464 (1938); *Kansas City Power & Light Company* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924 (D.C.D.C. 1955), *cert. denied* 350 U.S. 884 (1955).

tract provides for the ultimate sale of Twenty-five Percent (25%) of plaintiffs' stock. Plaintiffs contend that the Bank is required to act prudently in other matters so that the plaintiffs' stock will be marketable. Plaintiffs also complain about repayment features of the loan. In the opinion of the Court, none of these contentions are sufficient to establish an implied contract guaranteeing plaintiffs what amounts to a virtual monopoly in the borrowing of the Bank's funds to establish a pulp mill in Brazil. Furthermore, where the contract between the parties is detailed and specific, as in the instant case, the courts will not improvise an implied contract.[10]

Plaintiffs have failed to demonstrate irreparable injury or the probability of ultimate success.

Although counsel for the Bank has not raised the question of an indispensable party, nevertheless, the Court notes that the competing customer (the Klabin group) is not before the Court. This familiar doctrine alone would preclude the taking of such action as is sought by the plaintiffs in that it would be highly prejudicial to this missing indispensable party.[11]

For these reasons, plaintiffs' motion for preliminary injunction should be and is denied, and defendant's motion to dismiss is granted.

OLIVER GASCH
Judge

March 25th, 1966.

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10 *Roebling* v. *Dillon*, 109 U.S. App. D.C. 42, 288 F. 2d 386 (1961), *cert. denied* 366 U.S. 918 (1961); *Fort Sill Gardens, Inc.* v. *United States*, 355 F. 2d 636 (Ct. Cl. 1966).

11 *Lumbermen's Mutual Casualty Company* v. *Elbert*, 348 U.S. 48 (1954).

Notice of Appeal

Notice is hereby given that Lutcher S.A. Celulose e Papel and F. Lutcher Brown, plaintiffs above named, hereby appeal to the United States Court of Appeals for the District of Columbia circuit from the Order granting defendant's Motion to Dismiss and denying plaintiffs' Motion for Preliminary Injunction entered in this action on March 28, 1966.

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March 31, 1966

BRIEF FOR APPELLANTS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20166

LUTCHER S.A. CELULOSE E PAPEL and F. LUTCHER BROWN,
Appellants,

v.

INTER-AMERICAN DEVELOPMENT BANK, *Appellee.*

On Appeal From Order of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

STATEMENT OF QUESTIONS PRESENTED

1. Is the Inter-American Development Bank immune from suit by a borrower on a loan contract?

2. Did the District Court follow the requirements of giving the proper consideration to the pleadings of the Plaintiff and the alternate forms of relief and the presence or absence of necessary parties when it granted Defendant's Motion to Dismiss?

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v.

INTER-AMERICAN DEVELOPMENT BANK, *Appellee.*

On Appeal From Order of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Lutcher S.A. Celulose e Papel and F. Lutcher Brown have appealed to this Court to review and set aside an Order of the United States District Court for the District of Columbia granting Appellee's Motion to Dismiss the Complaint and denying Appellants' Motion for Preliminary Injunction filed on March 28, 1966. The jurisdiction of this Court is invoked pursuant to, and venue is based upon, Sections 1294, 1331, and 1332 of Title 28, United States Code, 62 Stat. 930, 80th Cong., 2d Sess., June 25, 1948, and Public Law 86-147, 73 Stat. 299.

Lutcher S.A. Celulose e Papel is a corporation organized and existing under the laws of Brazil and F. Lutcher Brown is a citizen of Brazil. The Inter-American Development Bank is an international organization in which the United States participates by virtue of Public Law 86-147, 73 Stat. 299, 86th Cong., 1st Sess., August 7, 1959. The Bank has its principal office in Washington, D. C., and has issued securities in the United States.[1]

Section 8 of Public Law 86-147, 73 Stat. 300, states:

> "JURISDICTION AND VENUE OF ACTIONS Sec. 8. For the purpose of any action which may be brought within the United States, its Territories or possessions, or the Commonwealth of Puerto Rico by or against the Bank in accordance with the agreement, the Bank shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a State court into the district court of the United States for the proper district by following the procedure for removal of causes otherwise provided by law."

STATEMENT OF THE CASE

The Inter-American Development Bank came into legal existence on December 30, 1959 and commenced operations in October, 1960. Lutcher S.A. was one of the first applicants for a loan and in June, 1961 Lutcher S.A. received the first loan made by the Bank to a private entity and the first loan to any borrower in Brazil.[2]

In late 1961 Lutcher S.A. became aware that the Bank was considering a loan request from Papel e Celulose

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1 Joint Appendix, pp. 1, 21, 56.

2 Joint Appendix, pp. 2-3.

Catarinense Ltda. (also referred to as the Klabin group). Papel e Celulose Catarinense Ltda. at that time operated the largest integrated pulp and paper facility in Brazil at Monto Alegre in the State of Parana, Brazil and had a complete monopoly in the product of newsprint. F. L. Brown came to Washington and pointed out to the Bank staff that there were serious errors in the market data being relied upon by the Bank. In a letter dated January 11, 1962 to each executive director of the Bank F. L. Brown called attention to the erroneous facts being relied upon by the Bank and he pointed out to each executive director that if the Bank granted the request by the Klabin group for a loan to build another integrated pulp and paper facility the effect would be to drive out of existence numerous independent paper mills which the Bank knew were the customers for the pulp produced by Lutcher S.A. These independent mills constituted the market justification for the Bank's loan to Lutcher S.A. in 1961. In his January 11, 1962 letter to each executive director Mr. Brown pointed out that the effect of the Bank's action would be to lessen competition in the manufacture of Kraft type paper in that the construction of an additional integrated facility by the Klabin group would destroy the competitive effectiveness of numerous independent paper mills and this action would react backward to adversely effect Lutcher S.A. which anticipated selling pulp to the independent paper mills.

In the aforementioned letter of January 11, 1962 Mr. Brown urged the Bank to appoint an independent market analyst to advise the Board of Directors as to the accuracy of Mr. Brown's statements and Mr. Brown offered to pay the expense of having this done. The Bank ignored Mr. Brown's warnings and protest and in January, 1962 granted a loan of five million dollars to the Klabin group.

Further corroboration of the accuracy of Mr. Brown's representations to the Bank in 1962 is provided by the

fact that the Klabin group, although four years have gone by, have not yet commenced construction of the project for which it received the Bank's loan.

In the course of the conversations between representatives of Lutcher S.A. and the Bank on the Klabin matter, representatives of the Bank on numerous occasions made statements to the effect that even if the internal Brazilian market were inadequate for Lutcher S.A. and the Klabin group, Lutcher S.A. could export its products to other Latin American countries. This possibility, however, was severely restricted if not completely destroyed in December, 1962 when the Bank granted a loan of fifteen million dollars to Compania Manufacturera Papeles y Cartonese of Chile. Before the Bank granted this loan Mr. F. L. Brown again cautioned the Bank as to the inadequacy of the pulp and paper market in South America. Mr. Brown reminded the Bank's representatives of their advice to him that in order to minimize the damaging effects of the Bank's fostering the expansion of Klabin in Brazil that Lutcher S.A. could export. Mr. Brown warned the Bank that this huge expansion of the then largest existing integrated pulp and paper facility, Compania Manufacturera Papeles y Cartones, in South America would eliminate any possibility of Lutcher S.A. being able to market its product by exports to other Latin American countries. The Bank granted the loan to the Chilean company notwithstanding the warnings and protest of Lutcher S.A.

As noted earlier, the Klabin group still has not executed the project for which it received a loan of five million dollars in January, 1962. In the fall of 1965 the Klabin group requested the Bank's clearance to incur additional indebtedness to commence the project. Lutcher S.A. had struggled through the most chaotic years in the history of Brazil and completed its plant, but Lutcher S.A. was now in a desperate financial situation. Lutcher S.A. could not market its pulp in Brazil or outside Brazil due

to (1) inadequacy of demand and (2) lower price competition from Compania Manufacturera Papeles y Cartones of Chile. The Brown family was trying to interest new investors in coming in to Lutcher S.A. in order to (1) raise additional funds that could be used to effect additional economies in production and forward integration in the hope of being able to eventually compete with the Klabin group and the Chilean group and (2) because the loan contract between the Bank and Lutcher S.A. required that, by 1968, 25% of the ownership of Lutcher S.A. must be in the hands of persons other than the Brown family.

When the Klabin group came to the Bank to obtain clearance to incur additional indebtedness, Lutcher S.A. again urged the Bank to carefully study the Lutcher S.A. plant and the market before taking any action on the Klabin request. The Bank has attempted to create the impression that Lutcher S.A. is attempting to "block" the progress of the Klabin group. This is not true. Lutcher S.A. has offered to totally withdraw from the pulp field in Brazil, to merge with the Klabin group on any reasonable terms, or to take any other steps which are reasonable in the light of all of the facts. Lutcher S.A. has simply stressed to the Bank that the pulp and paper market presently and for at least five years in the future is not adequate to support the existence of both Lutcher S.A. and the proposed Klabin mill. Lutcher S.A. pointed out that a study dated July 1965 of the pulp and paper market in Brazil by the National Economic Development Bank of Brazil corroborates the representations of Lutcher S.A. In addition and more recently, the International Finance Corporation completed a study in January 1966 which Lutcher S.A. has reason to believe is even less optimistic as to the pulp and paper market in Brazil than was the aforementioned study of the National Economic Development Bank of Brazil. The Inter-American Development Bank agreed in December 1965 and confirmed in January 1966 to have an independent

study made of Lutcher S.A. and the pulp and paper market by mutually agreed upon experts. In reliance upon this agreement, the members of the Brown family and the company incurred further obligations and Lutcher S.A. was further jeopardized. But in February 1966 the Bank went back on its word to have a market study made. It then seemed clear that the Bank intended to approve the Klabin request regardless of the condition of the market and regardless of the effects on Lutcher S.A.

Lutcher S.A. and F. Lutcher Brown contend that this action by the Bank is improvident and reckless; it is a breach of an implied obligation not to hinder or obstruct Lutcher S.A. in the performance of its loan contracts; and it is a breach of an express obligation to engage in the conduct of certain studies. The Bank's actions have damaged Lutcher S.A. and F. Lutcher Brown directly and unless relief is granted further irreparable damage will ensue.

To prevent the Bank from taking this action Lutcher S.A. filed suit in the U. S. District Court for the District of Columbia. On March 25, 1966 Judge Oliver Gasch granted the Bank's Motion to Dismiss and denied the Motion for Preliminary Injunction by F. Lutcher Brown and Lutcher S.A.

STATUTES AND ORDERS INVOLVED

The statutes involved are the Inter-American Development Bank Act, P.L. 86-147, 73 Stat. 299, 300, 86th Cong., 1st Sess., August 7, 1959; the International Organizations Immunities Act, 22 U.S.C. 288, 59 Stat. 669, 79th Cong., 1st Sess., December 29, 1945; Executive Order No. 10873, April 8, 1960, 3 C.F.R. 404; Executive Order No. 11019, April 27, 1962, 3 C.F.R. 599; and the Articles of Agreement Establishing the Inter-American Development Bank, Vol. 10, Part 3, United States Treaties and Other International Agreements 1959, Department of State, page 3029.

STATEMENT OF POINTS

1. The Articles of the Bank, the Public Law providing for United States participation in the Bank, and all of the pronouncements of the Executive Branch of the Government affirm that the Inter-American Development Bank has full juridical personality and can be sued by a borrower.

2. When the District Court held that it did not have jurisdiction because the Court believed the Bank to be immune, the District Court should not have ruled on the merits of the case by holding that the complaint did not state a cause of action; especially since this was a case of first impression.

3. Since the complaint alleged several sets of facts, all growing out of the relationship between the Appellants and Appellees as parties to two contracts, the District Court should not have dismissed the complaint for failure to state a cause of action because the Court held that one set of facts did not constitute a cause of action.

4. Because the District Court believed that an indispensable party was missing insofar as relief might be granted under one set of facts, the court should not have dismissed the complaint when relief could be granted on other sets of facts which did not involve other parties.

SUMMARY OF ARGUMENT

I

The founders of the Inter-American Development Bank contemplated that the Bank could be sued by persons other than member countries and/or those deriving claims from members. This is manifest in the Bank's Articles of Agreement and also in the statement of Assistant Secretary of the Treasury T. Graydon Upton, who represented the United States in the negotiations of organizing the Bank. The President of the United States and the Congress made express pronouncements that the Bank was

not immune from suit, except by member countries and those deriving claims from members. In view of the clear provisions of the Bank's Articles and the Legislative and Executive pronouncements, it was clearly erroneous for the District Court to have held that the Bank is immune from suit by a borrower.

II

A District Court should not rule on the merits of a complaint until after the Court has accepted jurisdiction. Having ruled that it lacked jurisdiction it was an error for the District Court to have passed upon the sufficiency of the complaint. This is the first known case of a borrower suing an international lending agency; the case involves novel factual issues never before ruled upon by any court. The District Court should not have acted summarily on any ground in such a case, but especially after not having held that it lacked jurisdiction.

III

The complaint alleged several sets of facts as the basis of causes of actions by the Appellants against the Appellee. These sets of facts ranged from (a) knowingly acting in a wrongful way in granting a loan to an integrated pulp and paper entity when the known effect of that action would be to hinder the Appellant Lutcher S.A. in fulfilling its contracts with the Appellee to (b) inducing Appellants to incur debts and expend funds in reliance upon the commitment of Appellee to make certain studies and then breaching those commitments. Pretrial discovery might well have disclosed additional causes of actions. The District Court ruled only on the allegations as they related to the Bank's actions vis-a-vis another borrower and the District Court did not consider the Bank's breaching its agreement with the Appellants to conduct certain studies. The District Court did not give the Plaintiffs below the benefit of all possible causes of actions disclosed to the Court.

IV

If the District Court had given the Plaintiffs below the benefit of all possible causes of actions in the facts disclosed to the Court below, and if the Court had allowed all the favorable inferences that could be drawn therefrom, the Court would have seen that there were sets of facts upon which relief could have been granted without having any other parties in the proceeding. Even if the District Court were correct that Klabin, another borrower from the Bank, was an indispensable party insofar as concerned the issue of enjoining the Bank's action vis-a-vis Klabin, Klabin is not an indispensable party to compelling the Bank to honor its agreement with Lutcher S.A. to conduct certain studies nor to compelling the Bank to modify its contracts with Lutcher S.A.

ARGUMENT

The Bank Is Not Immune From This Suit

The Articles of Agreement Establishing the Inter-American Development Bank, Article XI, Section 3, state:

> "JUDICIAL PROCEEDINGS
>
> Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.
>
> "No action shall be brought against the Bank by members or persons acting for or deriving claims from members. However, member countries shall have recourse to such special procedures to settle controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank or in contracts entered into with the Bank.
>
> "Property and assets of the Bank shall, wheresoever located and by whomsoever held, shall be considered public international property and shall be

> immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action."[3]

The plain reading of this provision is that anyone can sue the Bank, except member countries and those deriving claims from members. A borrower from the Bank, provided it is not a member country and does not derive its claim from a member country, a fortiori could sue the Bank. This provision in the Bank's Articles is an express, clear and unequivocal waiver of any immunity.

On May 11, 1959, President Eisenhower transmitted to Congress the Agreement Establishing the Bank and also a Special Report of the National Advisory Council. The Special Report, on page 18, stated:

> "To carry out its operations the Bank is to have full juridical personality, though actions may not be brought against the Bank by members or persons deriving claims from members. Other legal actions, however, may be brought against the Bank in courts of the countries in which the Bank has an office or has appointed an agent to act for it or has issued or guaranteed securities (Art. XI, secs. 2 and 3)."[4]

Members of the House Banking and Currency Committee, during Hearings on June 3, 1959, questioned Mr. T. Graydon Upton, then Assistant Secretary of the Treasury and now Executive Vice President of the Inter-American Development Bank, as to the provisions in the Bill regarding suits against the Bank. Mr. Upton replied in a letter which clearly sets forth that member countries could not sue the Bank but other persons could. Mr. Upton's letter stated:

> "Section 8 of the legislation, *which provides a court of jurisdiction in the United States for suits against*

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[3] Joint Appendix, p. 53.

[4] House Document No. 133, 86th Cong., 1st Sess., May 11, 1959.

> *the Bank,* is not inconsistent with the provisions of Section 3 of Article XI of the agreement, which prohibits actions against the Bank by member countries. Under the agreement, the Bank may be sued by persons other than member countries. It is possible that such other persons might have a claim against the Bank. To mention one such possibility, the Bank might have a liability to private persons in the United States on bonds which it had issued, and the agreement does not prohibit a suit against the Bank by any such private individual. Thus, in order fully to provide for the implementation of the agreement in the United States, it is necessary to provide for a court of jurisdiction for any such actions against the Bank."[5] (Emphasis added.)

The law, as it was enacted, made express provision for suits against the Bank by persons other than members.[6]

President Eisenhower on April 18, 1960 by Executive Order No. 10873 designated the Bank as an international organization within the meaning of the International Organizations Immunities Act.[7] However, on April 27, 1962 President Kennedy issued Executive Order No. 11019 "To Provide For An Exception To The Inter-American Development Bank's Immunity From Suit Specified In The International Organizations Immunities Act."[8]

The pattern of the legislative history and the Inter-American Development Bank Act itself, plus the Articles of the Bank, reflect the clear intention of the Bank's having full judicial personality, to sue and be sued, except that member countries could not sue the Bank. The Inter-American Development Bank has been sued twice in the

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5 Hearing on H.R. 7072, Subcommittee No. 1, Banking and Currency Committee, 86th Cong., 1st Sess., June 3, 1956, p. 20.

6 Public Law 86-147, Sec. 8, 73 Stat. 299, 300, 86th Cong., 1st Sess., August 7, 1959.

7 Executive Order No. 10873, April 8, 1960, 3 C.F.R. 1959-63 Comp., p. 404.

8 Executive Order No. 11019, April 27, 1962, 3 C.F.R. 1959-63 Comp., p. 599.

United States District Court for the District of Columbia.[9] The Court below distinguished these cases from the instant case.[10] But appellants respectfully submit that it was error for the Court below to have expanded the wording of the statute to create an immunity where none previously existed. There is no precedent of a borrower suing an international lending agency; but one commentator has made a searching and most relevant analysis of the International Finance Corporation, an organization similar to the Inter-American Development Bank, whose Articles of Agreement contain a provision which is similar to Article XI, Section 3 of the Bank's Articles.[11] That writer referred to a Federal District Court case wherein Judge Learned Hand declared, "The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the multitude of cases arising from governmental activities which are increasing so fast."[12] Then, the commentator said:

> "Article VI, Section 3 of the IFC Articles recognizes this principle by making the IFC suable in a court of competent jurisdiction within the territory of a member. The section is broad enough to cover actions sounding in tort as well as contract and such application would be consonant with established municipal criteria. Of particular significance, however, is the fact that no actions maybe brought against the IFC by its sovereign shareholders or persons acting for or deriving claims from shareholders. The exclusion undoubtedly is calculated to assure the IFC's survival, rather than to broaden its immunity needlessly."[13]

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9 Joint Appendix, p. 154.

10 Id.

11 Glazer, *A Functional Approach to the International Finance Corporation*, 57 Columbia L. Rev. 1089 (1957). Because of the similarity in nature of the IFC and the Inter-American Development Bank, this work is most enlightening and useful in the instant case.

12 *Gould Coupler* v. *United States Shipping Board Emergency Fleet Corp.*, 261 F. 716, 718 (D.C. S.D.N.Y., 1916).

13 Glazer, supra fn. 11, p. 1098.

In other words, the I.F.C.'s Articles like the Inter-American Development Bank's Articles clearly state that the organization can be sued, but not by member countries or those deriving claims from members. The express inclusion of a provision for immunity from suit by member countries is an absolute exclusion of immunity from suit by anyone else. *Inclusio unius est exclusio alterius.* The International Organizations Immunities Act confers immunity from suit *unless* such immunity is waived and it is perfectly clear from the Bank's Articles—"Actions can be brought against the Bank . . ."—that the Bank has waived any immunity it might derive under the Act, and Executive Order No. 11019 confirmed this fact.

The Court below, beginning at page 3 of its Memorandum, referred to the doctrine of soverein immunity and concluded that, "Where delicate, complex issues of international economic policy are involved, jurisdiction should be denied."[14] This conclusion is erroneous in light of the general law as to sovereign immunity and also in light of the specific Legislative and Executive pronouncements affecting the Bank. In 1945 the Supreme Court held:

> "(It) is therefore not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize."[15]

And in a concurring opinion to that decision in which Justice Black joined him, Justice Frankfurter said that the courts "should not disclaim jurisdiction" unless the department of the government charged with the conduct of foreign relations or the Congress "explicitly asserts that the proper conduct of these relations calls for judicial abstention. * * * And unless constrained by the established policy of our State Department, courts will best dis-

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[14] Joint Appendix, p. 154.

[15] *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

charge their responsibility by enforcement of the regular judicial processes." [16]

In 1955, writing for a majority of the Supreme Court in *National City Bank* v. *Republic of China*,[17] Justice Frankfurter noted that Chief Justice Marshall, in *The Schooner Exchange* v. *M'Faddon*,[18] had described the considerations underlying the immunity of foreign sovereigns from suit in United States courts. Essentially, it involves the avoidance of embarrassment to the Executive Department in the conduct of the foreign relations of the United States. Justice Frankfurter went on in the *National City Bank* case to explain that the freedom of a foreign sovereign from suit in the courts of the United States has become "part of the fabric of our law" but "solely through adjudications of this Court." [19] He then referred to the relation of the immunity of foreign sovereigns in United States courts and the immunity enjoyed by the United States and succinctly described the evolution of the doctrine of a foreign sovereign's immunity from suit as follows:

> "But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as 'Public opinion as to the peculiar rights and preferences due to the sovereign has changed,' Davis v. Pringle, 268 US 315, 318, 69 L ed 974, 978, 45 S Ct 549; 'There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past . . . ,' White v. Mechanics Secur. Corp., 269 US 283, 301, 70 L ed

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16 Id., pp. 41-42.

17 348 U.S. 356, 358 (1955).

18 (US) 7 Cranch 116 (1812).

19 Ibid, footnote 17, supra.

275, 279, 46 S Ct 116; '. . . the present climate of opinion . . . has brought governmental immunity from suit into disfavor . . . ,' Keifer v. Reconstruction Finance Corp., 306 US 381, 391, 83 L ed 784, 789, 59 S Ct 516. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797. At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign. And because of the objections to ad hoc legislative allowance of private claims, Congress a hundred years ago created the Court of Claims, where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become a commonplace in regard to the various agencies which carry out 'the enlarged scope of government in economic affairs,' Keifer v. Reconstruction Finance Corp. supra (306 US at 390). The substantive sweep of amenability to judicial process has likewise grown apace.

"The lookout and feeling thus reflected are not merely relevant to our problem. They are important. The claims of dominant opinion rooted in sentiments of justice and public morality are among the most powerful shaping-forces in law-making by courts. Legislation and adjudication are interacting influences in the development of law. A steady legislative trend, presumably manifesting a strong social policy, properly makes demands on the judicial process. See James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays (1934), pp. 213 et seq.; Harlan F. Stone, The Common Law in the Under States, 50 Harv L Rev 4, 13-16.

"More immediately touching the evolution of legal doctrines regarding a foreign sovereign's immunity is the restrictive policy that our State Department has taken toward the claim of such immunity. As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. Ex parte Peru, 318 US 578, 581, 87 L ed 1014, 1016, 63 S Ct 793. Its failure

> or refusal to suggest such immunity has been accorded significant weight by this Court. See Compania Espanola de Navigacion Maritima, S.A. v. The Navemar, 303 US 68, 82 L ed 667, 58 S Ct 432; Mexico v. Hoffman, 324 US 30, 89 L ed 729, 65 S Ct 530. And this for the reason that a major consideration for the rule enunciated in The Schooner Exchange is the embarrassing consequences which judicial rejection of a claim of sovereign immunity may have on diplomatic relations. Recently the State Department has pronounced broadly against recognizing sovereign immunity for the commercial operations of a foreign government, 26 Dept State Bull 984 (1952), despite the fact that this Court thirty years earlier rejected the weighty opinion of Judge Mack in The Pesaro (DC NY) 277 F 473 (see, also, his opinion in The Gloria, 286 F 188), for differentiating between commercial and war vessels of governments. Berizzi Bros. Co. v. The Pesaro, 271 US 562, 70 L ed 1088, 46 S Ct 611."

The Department of State has not expressed itself to the District Court that the Inter-American Development Bank is immune from suit in United States Courts. For this reason, if for no other, it was error for the District Court to hold that the Inter-American Development Bank was immune.[20]

In 1965, the Second Circuit Court of Appeals said:

> "The court below upheld the defendant's plea of sovereign immunity. The State Department here makes no suggestion of immunity."[21]

The Court went on to relate that, "Sovereign immunity 'is a legal doctrine which has not been favored by the test of time'" and it reversed the District Court.[22]

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[20] In the case of *Banco Para El Com. Exterior de Cuba* v. *Steamship Ruth Ann*, 307 F. 2d 415 (Cir. 1, 1962) a Circuit Court vacated a District Court order and remanded the case to the District Court with instructions to seek advice from the Department of State as to the status of one of the parties.

[21] Wacker v. Bisson, 348 F. 2d 602, 609 (Cir. 2, 1965).

[22] Id.

The same conclusion results if this Court takes the most recent Executive Order, No. 11019, April 27, 1962, as the pronouncement of the Executive Department on this point. The Executive Order No. 11019 is captioned: "Amending Executive Order No. 10873 To Provide For An Exception To The Inter-American Development Bank's Immunity From Suit Specified In The International Organizations Act."[23] By this Executive Order, the Executive Branch of the Government has expressly removed any possible doubt that the Bank is subject to suit in the United States District Court for the District of Columbia.

Neither the Articles of Agreement Establishing the Bank, Art. XI, Sect. 3,[24] nor Executive Order 11019,[25] limit suits against the Bank in any way. To hold that borrowers, who are in a contractual relationship with the Bank, are somehow excluded from the application of the Bank's Articles and Executive Order 11019 is contrary to the Supreme Court's admonition against allowing immunity on new grounds. When a borrower enters into a contractual relationship with the Bank, the borrower has every much right to rely upon the provisions of the Bank's Articles and implementing acts as does the bondholder or any other contracting party.

Consideration of Executive Order 11019; i.e. President Kennedy's Order of April 27, 1962, is especially appropriate in light of the comments of one commentator. The Kennedy Order expressly stated that it amend the earlier Eisenhower Executive Order to provide an *exception* to the Inter-American Development Bank's immunity from suit under the International Immunity Act.[26] A Note in the Harvard Law Review on the subject of the Status of

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23 3 C.F.R. 594.

24 Joint Appendix, p. 53.

25 Ibid, footnote 16, supra.

26 Id.

International Organizations Under the Law of the United States contains the following observation:

> "If the President withdraws the designation of such an organization or *limits its capacity* under the act, this decision seems an exercise of his legislative authority under the act and should be binding on the courts, just as was the original designation of the organization."[27] (Emphasis added.)

The original Executive Order apparently left room for some doubt as to the susceptibility of the Bank to suit. The second Executive Order unequivocally harmonizes the Executive pronouncement with the United States legislative intent and expression as well as the Articles of Agreement establishing the Bank. The only immunity from suit enjoyed by the Bank is the immunity from suit by member countries or persons deriving claims from member countries.

Contrary to the belief of the Court below, American and international policy favors the proposition that the Bank can be sued by its borrowers. In a very old case, *The Anne,*[28] the Supreme Court distinguished between *political* and *economic* activities in the application of the doctrines of sovereign immunity. The Supreme Court held in that case that consular officials, who engaged in commercial activities rather than political activities, were subject to the jurisdiction of United States courts. A federal court in New York in the case of *The Pesaro,* aptly stated a sound reason for this policy:

> "To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage

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27 71 Harvard Law Review 1300, 1307 (1958).

28 3 Wheat. 435 (1818).

and detriment of those in whose favor the immunity might be granted.''[29]

More recently, in 1953, a further indication of the trend toward limiting sovereign immunity appeared in the American Journal of International Law.[30] In this article the author refers to a letter dated May 2, 1952, from the Acting Legal Adviser of the State Department which relates:

> ''According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis) . . .''[31]

To distinguish between sovereign and non-sovereign acts, the Harvard Research in International Law proposed in 1932 the rule that:

> ''A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise whereever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.''[32]

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29 277 F. 473, 481 (D.C.S.D. N.Y., 1921). Although the Supreme Court later reversed that decision, 271 U.S. 562, Justice Frankfurter in the *National City Bank* case, supra, acknowledged the ''weighty opinion'' of District Court Judge Mack. See the opinion of Justice Frankfurter quoted at page 14 of this brief.

30 Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 Am. Jour. Int'l. Law 93 (1953).

31 Dept. of State Bulletin, Vol. 26, June 23, 1952, p. 984. This expression of policy by the Department of State was noted by the Supreme Court in National City Bank v. Republic of China, supra, footnote 16.

32 Art. 11, Draft Convention on Competence of Courts in Regard to Foreign States, 26 Am. Jour. of Int'l. Law 597, et seq. (1932).

And in 1958, still another commentator wrote:

> "Increasing participation by states and international organizations in commercial activities justifies the curtailment of immunity so that private persons will not be injured because of an inability to subject business relations with them to legal controls."[33]

The Bank, in this case, in order to avoid legal control of its business relations with the Appellants took resort to a position diametrically contrary to the Articles of Agreement Establishing the Bank. The Bank argued in the Court below:

> "It seems to us, Your Honor, that there is everything against this lawsuit, all kinds of public policy considerations both here and Brazil, all kinds of sensitive international relations, political relations, Congressional involvement, State Department and what have you, as well as the integrity of the Bank. And hence the complaint probably should be dismissed at Your Honor's earliest convenience."[34]

This argument is in direct conflict with Article VIII, Section 5(f) of the Bank's Articles, which reads:

> "The Bank, its officers and employees shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purpose and functions stated in Article I."[35]

When this provision of the Bank's Articles is read against the background of the Supreme Court decisions in *The Anne*[36] and *National City Bank* v. *Republic of China*[37] and

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[33] 71 Harvard Law Rev. 1300, 1312 (1958).

[34] Joint Appendix, p. 144.

[35] Joint Appendix, p. 50.

[36] Ibid, footnote 28, supra.

[37] Ibid, footnote 17, supra.

the Legislative and Executive pronouncements[38] relative to the Inter-American Development Bank, the conclusions are inescapable that the political and diplomatic considerations which underlie the immunity of foreign sovereigns are not present here and that the Bank is suable in the United States District Court for the District of Columbia. The order of the District Court is therefore clearly erroneous in dismissing the complaint herein for lack of jurisdiction because said order is inconsistent with the Articles of Agreement of the Bank, which is a Treaty to which the United States is a party; it is inconsistent with the legislation of the Congress providing for United States participation in the Bank; and it is inconsistent with the appropriate Executive Order designating the Bank an international organization.

III

The Complaint Stated More Than One Cause of Action

The complaint alleges, inter alia, that the Inter-American Development Bank knowingly and wilfully committed acts which the Bank knew were wrong and which the Bank knew would cause grave damage to the Appellants. These actions were, specifically, the combined acts of granting a loan to Klabin in Brazil and the imminent approval of Klabin's incurring additional indebtedness.

In June 1961 Lutcher S.A. received a loan of $4,700,000 to build a pulp mill in Brazil. Lutcher S.A. disclosed to the Inter-American Development Bank that it planned to sell its pulp to a number of small paper mills within Brazil and on this ground the Bank granted the loan. But after Lutcher S.A. received its loan, the Bank began to consider a loan to Klabin, which would enable Klabin to expand its existing integrated operation in Monte Alegre, Brazil by adding a new integrated mill. in Lajes, Brazil. This expansion would take up the paper market being supplied

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[38] See Public Law 86-147, Sec. 8, 73 Stat. 299 and Executive Order No. 11019, 3 C.F.R. 1959-63 Comp., p. 599, respectively.

by the numerous small paper mills to which Lutcher S.A. expected to sell pulp. Lutcher S.A. warned the Bank that the market data being considered to justify the Klabin loan was deliberately misleading and that if the Bank made this loan it would severely damage Lutcher S.A. and hinder Lutcher S.A. in performing its contract. Nevertheless, the Bank went ahead and granted the loan to Klabin in the amount of $5,000,000.

Meanwhile, another old, existing, and completely integrated paper facility in Chile—one of the largest in all of South America—had also applied for a loan. Lutcher S.A. again warned the Bank that expansion of the Chilean facility—Compania Manufacturera Papeles y Cartones—would take further business from the small paper mills to which Lutcher S.A. expected to sell its product because Papeles y Cartones would sell pulp and paper in Brazil. In addition, Papeles y Cartones would sell in other Latin American countries and thereby diminish any prospects of Lutcher S.A.'s exporting to such countries.

Lutcher S.A. emphatically pointed out that a non-integrated pulp mill like itself could not exist in an economic environment wherein the Bank repeatedly helped to expand already dominant integrated units. This set of facts constitutes one cause of action by the Appellants against the Bank because it involves the breach of an implied obligation not to hinder or obstruct Lutcher S.A. in fulfilling its contracts with the Bank.

This Court recognized a cause of action and standing to sue in a somewhat parallel case. The same arguments levelled here against the Appellants had been levelled at certain railroads which sought to enjoin experimental transportation of mail by air. This Court held that the railroads had standing to sue and stated: "It is a present interest stemming from substantial investments in [forest lands, plant buildings and machinery, etc.]." [39]

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[39] *Atchison, Topeka & S.F. Ry. Co.* v. *Summerfield*, 97 U.S. App. D.C. 203, 229 F. 2d 777 (D.C. Cir. 1955), cert. den. 351 U.S. 926.

Another cause of action is constituted by the set of facts surrounding the Bank's agreement with the Appellants in December 1965 to conduct (1) an analysis of the Lutcher S.A. plant and (2) an analysis of the pulp and paper market in Brazil.[40]

The Bank represented to the plaintiffs that at the conclusion of these studies the Bank would render certain assistance to Lutcher S.A., not excluding the possibility of further direct financial assistance from the Bank. Relying on these representations, Lutcher S.A. and F. Lutcher Brown incurred further debts and took other actions which they would not otherwise have taken. These representations of the Bank were made in December 1965 and confirmed in January 1966. But in February 1966 the Bank clearly breached the agreements made with the plaintiffs.

The complaint also recited that the actions of the Bank specifically hindered Lutcher S.A. in performing an express requirement of its loan contract with the Bank; namely to sell 25% of the shares in the company to members of the public other than the present principal shareholders.[41] Unless Lutcher S.A. complies with this requirement, it will be in default.

Notwithstanding these various sets of facts, and the varying forms of relief that might be granted as to them, the Court below took the view that this case involved a suit "by one of two competing customers who alleged that the Bank had imprudently loaned money to the second customer."[42] The Court below did not consider the other set of facts; e.g., the breach by the Bank of its agreement to study the Lutcher S.A. project and the market for its

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40 Joint Appendix, pp. 6-7.

41 Joint Appendix, pp. 9-10, 76.

42 Joint Appendix, p. 154.

products. The action of the District Court is contra to this Court's admonition that:

> "A motion to dismiss should not be sustained 'unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim' set forth by the plaintiff." [43]

Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 1A, Section 356, page 361, state:

> "The United States Supreme Court has endorsed 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' "[44]

This rule has been followed in a multitude of Circuit Court and District Court cases.[45]

It was inappropriate for the Court below to have analogized the Appellants' situation with that of borrowers from private banks. All private banks are regulated by Federal or state authorities. The Inter-American Development Bank being neither a state nor a federal bank is not subject to any such regulation.

Research by the Appellants' counsel has failed to produce any case involving private banks similar to the instant case, where suit was brought by a borrower. Apparently the Appellee found none either because it relied on cases entirely different and distinguishable from the instant

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[43] *Callaway* v. *Hamilton National Bank*, 90 U.S. App. D.C. 228, 195 F. 2d 555, 559 (Cir. D.C., 1952). See also *Dollar* v. *Land*, 154 F. 2d 307 (Cir. D.C., 1946), affirmed 330 U.S. 731 (1947).

[44] See *Conley* v. *Gibson*, 355 U.S. 41 (1957).

[45] See Barron and Holtzoff, *Federal Practice and Procedure* (1960), Vol. 1A, Section 356, Footnote 92, p. 361.

case.[46] But even the most recent case of the kind relied upon by the Appellee was decided favorably to the contentions of the Appellants here. This was the case of *The Western Colorado Power Company, et al.* v. *The Public Utilities Commission of the State of Colorado, et al.*[47] In May 1962, the Colorado-Ute Electric Ass'n., Inc. filed with the Public Utilities Commission of Colorado an application for a Certificate of Convenience and Necessity to construct a steam electric generating plant. In June 1962, the Association filed a petition for an order of the Commission authorizing the Association to execute notes payable to the United States of America not to exceed $22,876,000. Public Service Company of Colorado and The Western Colorado Power Company filed protests to the requests of the Association. These companies contended, inter alia, "that there did not exist any need nor necessity for the construction of the proposed plant and facilities of Colorado-Ute and that if such construction were authorized by the Commission it would result in substantial damage to the companies and their electric consumers."[48]

The Public Utilities Commission issued the Certificate to the Colorado-Ute Association and its action was confirmed by a lower court. The Supreme Court of Colorado reversed the lower court. In so doing, the Colorado court

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[46] The "private power vs. public power" cases, such as *Alabama Power Company* v. *Ickes*, 302 U.S. 464 (1938), and *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924 (D.C. Cir. 1955), cert. denied 350 U.S. 884, relied upon by the appellee and cited by the Court below, are distinguishable from the instant case in that the plaintiffs in the power cases had no contractual standing to sue. They were, indeed, strangers to the transactions in issue. In the Instant case, plaintiffs have standing, or privity, by virtue of two contracts with the defendant. But more significantly, see this Court's treatment of *Ickes* and *McKay* in *Atchison, Topeka & S.F. Ry. Co.* v. *Summerfield*, 97 U.S. App. D.C. 203, 229 F. 2d 777 (D.C. Cir. 1955), cert. denied 351 U.S. 926.

[47] —— Colo. ——, 411 Pac. 2d 785 (Sup. Ct. Colo., 1966).

[48] Id., p. 787.

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[47] —— Colo. ——, 411 Pac. 2d 785 (Sup. Ct. Colo., 1966).

[48] Id., p. 787.

made a comment which is very appropriate to the instant case:

> "We agree with Commissioner Zarlengo when he points out in his dissenting opinion the lack of evidence of public convenience and necessity:
>
> 'It appears that the Applicant has founded its case, in the main, on the premises that if the Hayden Plant and facilities be authorized, the power and energy produced *will find a market, all the while ignoring substantial proof and competent evidence as to the availability or non-availability of power and energy from existing sources* and the reasonableness of its cost to the consumer. To say the least, it has glossed over this phase, or, at most, tendered evidence which is vague, indefinite and uncertain.' " (Emphasis added).[49]

Lutcher S.A. has tried to point out to the Bank the lack of justification for the Bank's actions with respect to the Klabin group; but the Bank, like the Public Utilities Commission of Colorado, disregarded the substantial proof and competent evidence that there was no market to justify the Bank's action.

The Supreme Court of Colorado eventually reversed the lower court and the Public Utilities Commission and invalidated the Certificate of Necessity. The Court found that:

> ". . . the construction of the Hayden Plant, requiring an investment of approximately thirty million dollars, is not necessary to supply any present or foreseeable future electric requirements, . . ." [50]

There may be any number of reasons for the lack of cases on this point, but the most logical is that there have been no such cases because statutes provide other remedies

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[49] Id., p. 792.

[50] Id., pp. 793-794.

which are exclusive. For example, directors of a bank are liable to suit by a receiver for excessive and improvident loans.[51] The United States Code provides for suit by the Comptroller of the Currency in cases of excessive or improvident loans by national banks.[52]

In any event, it is completely inappropriate to analogize the relationship of a borrower from the Inter-American Development Bank with that of a borrower from a private bank. The Inter-American Development Bank by its Charter, lends to projects only when funds are not available from other sources.[53] The relationship of a borrower with the Inter-American Development Bank is more in the nature of a joint venture in that the Bank and the borrower undertake unusual risks to accomplish not only the attainment of profit but the social and economic development of the countries of Latin America. The Bank knew that Lutcher S.A. intended to build a plant in a remote and undeveloped area but one that was rich in preserves of Parana pine. The Bank knew that it would be necessary for Lutcher S.A. to construct roads, schools, a hospital, churches and many other facilities which are not usually incident to an industrial installation. The Bank knew that Brazil as a nation during the time that Lutcher S.A. was constructing its plant went through one of the most tumultuous periods in its history, beginning with the resignation of Janio Quadros in 1961 and culminating in the military revolution of 1964.[54]

As a Development bank, the Inter-American Bank should have assisted Lutcher S.A. and by all means avoided any

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51 *Federal Deposit Insurance Corp.* v. *Mapp's Executors, et al.*, 184 Va. 970, 37 S.E. 2d 23 (Sup. Ct. App. Va., 1946).

52 12 U.S.C. 93, 36 Stat. 1167, 61st Cong., Sess. III, March 3, 1911, and see also 13 Stat. 116.

53 Joint Appendix, p. 36.

54 See "Brazil", *Britannica Book of the Year 1962* and *Book of the Year 1965*, Encyclopedia Britannica, Inc., 1962 and 1965, respectively.

direct action detrimental to Lutcher S.A.; but the Bank has consistently acted without any consideration for the interests of Lutcher S.A. and in this latest incident of approving Klabin incurring additional indebtedness to the Bank, the Bank is acting directly against the interests of Lutcher S.A.

One recent example of the Bank's inconsiderate attitude and one of the sets of facts set forth in the complaint would constitute a course of action against the Bank occurred in December 1965. Lutcher S.A. had a loan payment of $470,915.54 due December 15, 1965. The Company advised the Bank several months prior to that date that it did not have funds available to make that payment and requested an extension. Appellant F. Lutcher Brown proposed to the Executive Vice-President and to the General Counsel of the Bank that the payment of the $470,915.54 be deferred until there had been completed a market study and a technical evaluation of the Lutcher S.A. project by independent experts mutually acceptable to Lutcher S.A. and the Bank and that these studies be financed by the $45,648 still on deposit and undisbursed to Lutcher S.A. The senior officers of the Bank took this proposal under consideration while at the same time representing that they would try to obtain an emergency loan for Lutcher S.A. from the Bank of Brazil. F. Lutcher Brown went to Brazil but his efforts to obtain a loan from the Bank of Brazil were of no avail. On December 14, 1965, only one day before the payment was due, the Executive Vice-President of the Bank and the General Counsel of the Bank informed representatives of Lutcher S.A. that if the $470,915.54 payment were made within the 15 day contractual grace period, i.e., by the end of December, the Bank would agree to have the independent market study and technical study proceed. H. L. Brown, father of the Appellant F. Lutcher Brown, loaned Lutcher S.A. $235,000 and Lutcher S.A. depleted itself of all cash to raise the balance necessary to make the $470,915.54 payment. The

Browns had repeatedly asserted to the Bank that economic conditions in Brazil were such that unless the Bank joined actively in the efforts to save Lutcher S.A., it was not logical nor economically practicable to put any additional funds into the company. But since the Bank made a new agreement—to have certain studies conducted and to actively study forms of assistance to Lutcher S.A., the Browns furnished additional consideration already called for from the company by the loan contract.

Shortly after the December 1965 payment had been made, respresentatives of Lutcher S.A. and the Bank met in January 1966 to discuss the terms of reference for the agreed-upon market study and the selection of the independent experts to make the study. The Bank representatives stated that they would submit to Lutcher S.A. the terms of reference and their nominee to conduct the study but several weeks passed without any word from the Bank. Finally, in the latter part of February 1966, the Bank made it clear that it did not intend to conduct a market study or have an independent market study made even though such a study was essential to a rational determination of the future of Lutcher S.A.

The Bank's representations to Lutcher S.A. caused Lutcher S.A. and members of the Brown family to take actions which they might not have otherwise taken; for the representations of the Bank clearly contain references to the Bank's providing additional assistance to Lutcher S.A. if the members of the Brown family would continue to make sacrifices to carry the Company until a long-range program could be devised and implemented for the progress of Lutcher S.A. in the context of the Bank's activities in the pulp and paper industry in Brazil. The Bank's reversal on its agreement to conduct the market study and its imminent approval of Klabin's proceeding to incur additional indebtedness clearly evidenced the Bank's unwillingness to accept the accuracy of the facts presented by

Lutcher S.A. In other words, the Bank was going to facilitate the expansion of Klabin even through the Bank knew that Klabin had a monopoly position in paper in Brazil and could destroy any competition from Lutcher S.A. by selling pulp at very low prices and recovering a greater profit on their manufactured paper articles which Lutcher S.A. cannot produce.

The Bank made its first loan in Brazil to Lutcher S.A. and thereby took on an obligation to give *some* consideration to the effect on Lutcher S.A. of subsequent loans in Brazil. When the Bank granted the loan of 5 million dollars to Klabin in 1961 and acted on market data that the Bank knew to be erroneous the Bank thereby violated its Charter which requires it to cooperate with private investors in carrying out the purposes of the Bank.[55] This action was a breach of its obligations to Lutcher S.A. specifically a breach of its implied obligation not to hinder or obstruct in the performance of its contract with the Bank. The action of the Bank which this complaint seeks to enjoin would be one more step in the destruction of Lutcher S.A. and one more step contrary to the fundamental purposes of a Bank.

If the decision of the court below is permitted to stand, borrowers from the Inter-American Development Bank, or any similar organization, will be completely deprived of all rights of recourse. Even if a borrower sought arbitration, as provided in its loan contract with the Inter-American Development Bank,[56] it could neither compel the Bank to arbitrate nor could it enforce an arbitral award because once the borrower went to court the Bank could claim immunity.

On appeal from an order granting a motion to dismiss, the Court of Appeals is required to accepted as true the

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[55] Joint Appendix, p. 31.

[56] Joint Appendix, pp. 82, 139.

allegations of the complaint[57] and the Court must view the case pleaded in the aspect most favorable to the plaintiff and most unfavorable to the defendant.[58]

In view of the fact that this case is extremely unique, the District court should not have dismissed it summarily. International lending agencies are relatively new creations. They came into being subsequent to World War II, and the defendant has only been in operation for six years. This is the first case of its kind brought against an international lending agency, and it behooved the District Court to permit a full presentation of evidence. Two commentators have reached the conclusion that such agencies can be sued,[59] and the Inter-American Bank itself has been sued twice in this jurisdiction.[60]

The recent comments of this Court in *Levin et al* v. *Joint Commission, etc.* an antitrust case, are very appropriate to this unique and far-reaching case. In *Levin* this Court referred to the Supreme Court's "admonition that 'summary procedures should be used sparingly in complex antitrust litigation.' *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962.)"[61] It is submitted that the instant case will establish a precedent governing the rights of all borrowers from international lending agencies, not only in the United States

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57 *Embassy Dairy* v. *Camalier,* 93 U.S. App. D.C. 364, 211 F. 2d 41 (Cir. D.C., 1954); *American Gold Star Mothers* v. *National Gold Star Mothers,* 89 U.S. App. D.C. 269, 191 F. 2d 488, 27 A.L.R. 2d 948; *Cromelin* v. *United States,* 177 F. 2d 275 (Cir. 5, 1949), cert. den. 339 U.S. 944; *Central-Penn Nat. Bank of Philadelphia* v. *Portner,* 201 F. 2d 607 (Cir. 3, 1953); *Hopkins* v. *E. I. DuPont De Nemours & Co.,* 199 F. 2d 930 (Cir. 3, 1953); *Duff* v. *Kansas City Star Co.,* 299 F. 2d 320 (Cir. 8, 1962).

58 *Priest* v. *Chicago, R.I. & P.R.R.,* 189 F. 2d 813 (Cir. 8, 1951).

59 Glazer, supra, footnote 9 and Note, 71 Harvard Law Review 1300, supra, footnote 29.

60 Joint Appendix, pp. 82, 138-139.

61 —— U.S. App. D.C. ——, 354 F. 2d 515, 518 (Cir. D.C., 1965).

but in all the countries of the world where such agencies have offices or have issued securities and the use of a summary procedure was therefore inappropriate.

IV

The Court Could Have Granted Relief Without the Addition of Any Other Party

As set forth under III above, the plaintiffs alleged facts which constituted more than one cause of action against the defendant. The court below considered only one; viz., restraining the defendant from granting clearance to another borrower from the defendant Bank to incur additional indebtedness.

The court below could have ordered the defendant Bank to perform its agreement to carry out the studies which it committed itself to have performed and upon which commitment the appellants relied to their detriment.

The Court below could have ordered modification of the contracts between Lutcher S.A. and the Bank, particularly with respect to the provision requiring sale of 25% of the shares of the company to persons other than the present principal shareholders.

None of these forms of relief require the presence in this litigation of any additional party or parties.

The fact that a plaintiff may not be entitled to all of the relief sought does not warrant dismissal of the entire action.[62] If facts alleged in complaint reveal that a plaintiff is entitled to any kind of relief, it is sufficient and the complaint should not be dismissed.[63]

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62 *Ecfoule* v. *Ellis*, 79 F. Supp. 336 (D.C. Ga., 1947).

63 *McIntyre* v. *Kansas City Bottling Co.*, 85 F. Supp. 708 (D.C. Mo., 1949), two cases, appeal dismissed, 184 F. 2d 671. See also *McGhan* v. *F. C. Hayer Co.*, 84 F. Supp. 540 (D.C. Minn., 1949).

A complaint is sufficient if it sets forth facts which show that the plaintiff is entitled to any relief which the court can grant, since every final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.[64]

If plaintiff Lutcher S.A. is entitled to modification of its contracts, or if plaintiffs Lutcher S.A. and F. L. Brown are entitled to damages because the Bank breached an agreement to make certain studies, Klabin is not an indispensable party to such relief.

Justice Sutherland for the Supreme Court, said:

> "The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. (Citing cases)."[65]

CONCLUSION

This is an important case and a unique case. The crucial issue is immunity, and it involves not only the Inter-American Development Bank, but also similar organizations; such as, the International Finance Corporation.

The Articles of Agreement Establishing the Bank, the Public Law enabling United States participation in the Inter-American Development Bank, the appropriate Executive Order, and the legislative history all clearly evidence the treaty and the legislative and the executive determinations that the Inter-American Development Bank can be sued by anyone, except member countries and those deriving claims from members. It is most important that this Court establish a correct judicial doctrine consistent with these documents. The holding of the Court below that the

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[64] *Hawkins* v. *Frick Reid Supply Corp.*, 154 F. 2d 88 (Cir. 5, 1946).

[65] *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

Bank is immune from suit by borrowers is erroneous and should be reversed, and the case should be remanded for a full trial on the merits.

Respectfully submitted,

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REPLY BRIEF FOR APPELLANTS

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20166

LUTCHER S.A. CELULOSE E PAPEL and
F. LUTCHER BROWN,
Appellants,

v.

INTER-AMERICAN DEVELOPMENT BANK,
Appellee.

On Appeal From Order of the United States District Court for the District of Columbia

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Appellee.

REPLY BRIEF FOR APPELLANTS

Summary of Argument

Appellee is not immune from this suit. The record discloses several causes of action and Appellants have standing to sue.

POINT I

The District Court erred in refusing to accept jurisdiction over the Bank on the ground that it was not amenable to suit by the Appellants as a borrower from the Bank under their loan contracts.

The District Court decided that Appellee is immune from suit because of the nature of the causes of action asserted, thereby confusing two distinct issues. Jurisdiction should be decided separately. Only after jurisdiction is found to exist, as Appellants maintain that it does, should the court consider the cause of action. *Cf. Bell* v. *Hood,* 327 U. S. 678, 682 (1946).

A. Under no rational construction of the Agreement Establishing the Bank, the applicable legislative enactments and executive decrees, can the Bank claim immunity from suit by one of its borrowers.

In arguing that the Bank is immune (BB 5),[1] Appellee, as did the court below, ignores the express, unqualified language of the first paragraph of Article XI, Section 3 of the Agreement Establishing the Bank:

> "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities." (JA 53).

This paragraph prescribes no qualifications as to the nature, type or character of the action, such as Appellee's distinction between "common garden variety of lawsuits" and suits "involving economic policy and judgment and discretion" (JA 148). Nor does the paragraph restrict the nature of the cause of action that may be brought, such as to a tort action or to a breach of contract action with a coffee shop (JA 154). The paragraph's purpose is unequivocally stated in the first five words: "Actions may be brought against the Bank * * *". The remainder of the paragraph limits only the venue of actions brought. Appellee therefore has no basis for claiming that "the Bank is in substantially the same posture as a sovereign government" and is not amenable to suit (JA 104).

Appellee, attempting to clothe the Bank with immunity, refers to the second paragraph of Article XI, Section 3 of the Agreement Establishing the Bank (hereinafter "Agreement"), which states: "No action shall be brought against the Bank by members or persons acting for or deriving claims from members" (JA 53). This para-

1. References in the form "BB" are to Appellee Bank's brief. References in the form "AB" are to Appellants' brief. References in the form "JA" are to the joint appendix.

graph is merely an agreement among the members that *they* will not bring suit, and complements other sections preserving the Bank's independence and integrity from the political influence of its members.[2]

As one commentator wrote when analyzing an almost identical prohibition against suits by members in the Articles of Agreement of the International Finance Corporation, "the exclusion undoubtedly is calculated to assure the [organization's] survival rather than to broaden its immunity needlessly."[3]

Despite the express provisions of Article XI, Section 3, Appellee attempts to create immunity for the Bank by invoking Section 4 of said Article (JA 102-103; BB 17):

> "Property and assets of the Bank, wheresoever located and by whomsoever held, shall be considered public international property and shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action." (JA 54).

This Section obviously has nothing to do with judicial process.

Similarly, Section 6, also cited by Appellee to endow the Bank with immunity (JA 103), provides:

> "To the extent necessary to carry out the purpose and functions of the Bank and to conduct its operations in accordance with this Agreement, all property and other assets of the Bank shall be free

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2. Article VIII, Section 5(d) of the Agreement (JA 49-50). Mr. T. Graydon Upton, then Assistant Secretary of the Treasury, now Executive Vice President of the Bank, in a letter supplementing his testimony before the House Banking and Currency Committee, stated: "Section 8 of the legislation, *which provides a court of jurisdiction in the United States for suits against the Bank,* is not inconsistent with the provisions of Section 3 of Article XI of the agreement, which prohibits actions against the Bank by member countires. *Under the agreement, the Bank may be sued by persons other than member countries.*" (AB 10-11) (Emphasis supplied.)

3. Glazer, *A Functional Approach to the International Finance Corporation,* 57 COLUM. L. REV. 1089, 1099 (1957).

> from restrictions, regulations, controls and moratoria of any nature, *except as may otherwise be provided in this Agreement.*" (JA 54) (Emphasis supplied.)

That Section 6 does not confer immunity from judicial process on the Bank or its property is made clear by reference to the third paragraph of Article XI, Section 3, which provides the "exception" set forth in the italicized portion of Section 6:

> "Property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution *before the delivery of final judgment* against the Bank." (JA 54) (Emphasis supplied.)

This paragraph clearly indicates that the Bank's stockholder-members acknowledged that the Bank was amenable to suit by non-members, and that a judgment could be obtained against it and satisfied out of its property.

Appellee also ignores the fact that the Inter-American Development Bank Act of 1959[4] (hereinafter "Act") clearly establishes the Bank's amenability to suit. This Act provides in Section 8, entitled "Jurisdiction and Venue of Action" that:

> "For the purpose of any action which may be brought within the United States, its territories or possessions, or the Commonwealth of Puerto Rico by or against the Bank in accordance with the agreement, the Bank shall be deemed to be an inhabitant of the Federal judicial district in which its principal office in the United States is located, and any such action at law or in equity to which the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States shall have original jurisdiction of any such action. When the Bank is a defendant in any such action, it may, at any time before the trial thereof, remove such action from a state court into the district court of the

4. 73 Stat. 299, 22 U.S.C. §§ 283-283i.

> United States for the proper district by following the procedure for removal of causes otherwise provided by law." (22 U.S.C. §283f).

Section 9 of the Act then provides that Section 3 of the Agreement, by which the Bank was rendered amenable to suit, "shall have full force and effect in the United States." (22 U.S.C. Section 283g).

The Act's legislative history clearly indicates that the Bank can be sued by non-members.[5] Congress by enacting this legislation established as a matter of domestic law the unqualified amenability of the Bank to suit in the United States by non-members.[6]

Appellee, despite the clear meaning of the Act and of the Agreement, seeks to confer immunity on the Bank by referring to Section 2(b) of the International Organizations Immunities Act of 1945 (hereinafter "Immunities Act"):

> "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and other forms of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may *expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.*" (JA 97) (Emphasis supplied.)

On April 8, 1960, President Eisenhower's Executive Order 10873 designated the Bank as an international organization under the terms of Section 1 of the Immunities Act and provided in part that:

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5. See the statement by Mr. Upton, now Executive Vice-President of the Bank, quoted in footnote 2, *supra*.

6. This was the understanding of the Executive Branch and the House Banking and Currency Committee at the hearings conducted on the proposed Act. On June 3, 1959, Mr. T. Graydon Upton, testified that "these particular Sections referred to [Sec. 3 of Article XI and Sec. 4(c) of Article X of the Agreement] are made a part of the law of the United States of America * * *." Hearings on H.R. 7072, Banking and Currency Committee, Subcommittee No. 1, 86th Cong., 1st Sess., June 3, 1959 at 21.

> "The designation of the Inter-American Development Bank as a public international organization within the meaning of the International Organizations Immunities Act shall not be deemed to abridge in any respect privileges, exemptions, and immunities which that organization may have acquired or may acquire by treaty or congressional action." 3 C.F.R. 1959-1963 Comp., p. 404.

Two years later, on April 27, 1962, President Kennedy amended President Eisenhower's Order *"to provide for an exception* to the Inter-American Development Bank's *immunity from suit* specified in the International Organizations Immunities Act." (JA 100-101) (Emphasis supplied.) This exception states: "* * * such designation shall not be construed to affect in any way the applicability of the provisions of Section 3, Article XI of the Articles of the Agreement of the Bank as adopted by the Congress of the United States in the Inter-American Development Bank Act * * *" (JA 100).

Appellee suggests that President Kennedy's Order merely implemented President Eisenhower's Order by providing that the designation would not affect "the immunity provisions" of Article XI, Section 3 of the Agreement (BB 14).

However, it is inaccurate to characterize these provisions as "immunity" provisions, since they specifically establish the Bank's amenability to suit. Moreover, President Kennedy's Order was clearly not a mere implementation of President Eisenhower's Order, since its express purpose was "to provide for an exception" to any immunity from suit which the Bank may have enjoyed by reason of its earlier designation as an international organization.

The Eisenhower Order, however, gave the Bank no immunity from suit under Section 2(b) of the Immunities Act. That Section confers immunity on international organizations except where they waive it "for the purpose

of any proceedings or by the term of any contract". Article XI, Section 3 of its Agreement, a contract between members of the Bank, made the Bank amenable to suit. This constituted a waiver of immunity under Section 2(b) of the Immunities Act. Furthermore, the Congressional approval of the Act in 1959 had clearly recognized the inapplicability of the Immunities Act insofar as the Bank's amenability to suit was concerned.

Nevertheless, by reading the Eisenhower Order out of its proper context, it might have been argued that the Bank enjoyed "the same immunity from suit and every form of judicial process as enjoyed by foreign governments" within the provisions of Section 2(b) of the Immunities Act. Such a construction, however, would conflict with the Bank's amenability to suit under the Agreement and under the Inter-American Development Bank Act and its legislative history.

Also, the Eisenhower Order might have been interpreted as making the Bank less amenable to suit than the International Bank for Reconstruction and Development (hereinafter "World Bank") and the International Finance Corporation (hereinafter "IFC"), similar public banking institutions.

For example, Executive Order 10680 of October 2, 1956, referring to the IFC, provided:

> "The designation of the International Finance Corporation made by this Order is not intended to abridge in any respect privileges, exemptions, and immunities which such corporation may have acquired or may acquire by treaty or congressional action; nor shall such designation be construed to affect in any way the applicability of the provisions of Section 3, Article VI, of the Articles of Agreement of the Corporation deposited in the archives of the International Bank for Reconstruction and Development." 3 C.F.R. 1954-1958 Comp., p. 320-321.

Section 3 of Article VI of the IFC Articles referred to in the above-quoted Order states that actions may be brought against the IFC by non-members.[7] That Section is identical in substance to Section 3 of Article XI of the Agreement Establishing the Bank.[8]

Similarly, Executive Order 9751 of July 11, 1946, designated the World Bank as an international organization under the Immunities Act, with the following qualification:

> "provided, that with respect to the International Bank for Reconstruction and Development, such designation shall not be construed to affect in any way the applicability of the provisions of Section 3, Article VII, of the Articles of Agreement of the Bank as adopted by the Congress of the United States in the Bretton-Woods Agreements Act of July 31, 1945 • • •" 3 C.F.R. 1943-1948 Comp., p. 558.

This Order evidences the same intention as the IFC Order not to affect in any way the applicability of the provisions of the Articles of Agreement which made the World Bank amenable to suit, and which are identical with Section 3 of Article VI of the IFC Articles, rendering that organization amenable to suit.[9]

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7. "Actions may be brought against the Corporation [IFC] only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation" 7 U.S.T. & O.I.A. 2214, T.I.A.S. No. 3620 (1955).

8. See page 2, *supra*.

9. "Actions may be brought against the [World] Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or

Thus it is clear that President Kennedy's Order, as its title indicates, was intended to and did eliminate any doubt as to Appellee's amenability to suit which it otherwise might have been erroneously considered to enjoy under the Immunities Act by reason of the Eisenhower Order. To accomplish this purpose, President Kennedy conformed the language of the Eisenhower Order to that of the earlier World Bank and IFC Orders.

B. Appellee's theory that the amenability of the Bank to suit depends upon the identity of the plaintiff or upon the type of action brought is not supported by the Agreement Establishing the Bank or by the applicable legislative enactments and executive decrees.

Appellee concedes that the Bank can be sued by holders of its bonds and participation certificates (JA 104-105) and by "other like creditors and beneficiaries of its guarantees" (BB 15) and by plaintiffs in "common garden variety lawsuits" (JA 148).

However, Appellee states that plaintiff's identified as borrowers cannot sue because "it can hardly be said a borrower * * * would regard it as essential to his purposes that he be in a position to force the Bank to submit to judicial process" (BB 16).

The Agreement Establishing the Bank does not support Appellee's theory that the plaintiff's identity can determine the Bank's amenability to suit. Article XI, Section 3 thereof quite clearly establishes that anyone, except members or those deriving their claims therefrom, can sue the Bank (JA 53-54).

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persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank." Art. VII, Section 3 of the Articles of Agreement With Other Powers (1945), 60 Stat. 1440, T.I.A.S. No. 1502.

"Members" and "private enterprises" were mentioned together as authorized recipients of loans in Article III, Section 4 (JA 35). If it had been intended to prohibit private borrowers from suing the Bank, surely they would have been specifically mentioned with "members" in Article XI, Section 3. Members alone were specifically prohibited from suing by their Agreement, not because they might be borrowers, but because they might take advantage of a lawsuit to influence the Bank for national political ends.

None of the provisions in the agreements establishing amenability to suit by non-members of the World Bank, the IFC, or the International Development Association (hereinafter "IDA"),[10] extend this prohibition to any other type of plaintiff. Neither do they delimit the types of action which may be brought.

However, Article IX, Section 3 of the Articles of Agreement of the International Monetary Fund (hereinafter "IMF"), incorporated by Congress into domestic law, simultaneously with the World Bank agreement in the Bretton Woods Agreements Act of 1945, is different; it makes no provision for amenability to suit: "the Fund, its property and its assets wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purposes of any proceedings or by the terms of any contract."[11]

If this broad limitation on amenability to suit had been intended for Appellee, Article XI, Section 3 of the Agree-

10. The World Bank and IFC provisions are set forth *supra* in footnotes 7 and 9. The equivalent IDA Agreement section is Section 3 of Article VIII: "Actions may be brought against the Association only in a court of competent jurisdiction in the territories of a member in which the Association has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members." 11 U.S.T. & O.I.A. 2284, T.I.A.S. No. 4607 (1960).

11. 59 Stat. 512, 22 U.S.C. §§ 286-286k-1; 60 Stat. 1401, T.I.A.S. No. 1501.

ment would have tracked the IMF language. Instead, Section 3 adheres closely to the language of the World Bank agreement, which made the World Bank amenable to suit by non-members.

The legislative history of the Inter-American Development Bank Act demonstrates that a variety of plaintiffs may sue Appellee. Mr. Upton, in his supplemental letter submitted at the request of the House Banking and Currency Committee, did not distinguish between types of non-member plaintiffs or between the types of actions they might bring:

> "Under the agreement, the Bank may be sued by persons other than member countries. It is possible that such other persons might have a claim against the Bank. To mention *one* such possibility, the Bank might have a liability to private persons in the United States on bonds which it had issued and the agreement does not prohibit a suit against the Bank by any such private individuals. Thus, in order to provide for the implementation of the agreement in the United States, it is necessary to provide for a court of jurisdiction for any such actions against the Bank." (AB 10) (Emphasis supplied.)

Moreover, general principles of international law do not support Appellee's unique theory. Under international law immuity flows from the sovereign identity of the person being sued, and not from *the identity of the plaintiff*. Appellee's theory suggests that holders of bonds of a foreign government may, upon default, simply because they are bondholders, sue that government without being barred by sovereign immunity. However, there are many luckless holders of defaulted foreign government bonds who can affirm that this is incorrect.

Nowhere does Appellee cite any authority explaining why some plaintiffs can sue and why borrowers cannot.

Appellee advances another unsupported theory when it asserts that amenability to suit should fluctuate with *the*

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Nowhere does Appellee cite any authority explaining why some plaintiffs can sue and why borrowers cannot.

Appellee advances another unsupported theory when it asserts that amenability to suit should fluctuate with *the*

type or character of the action brought. It states that the Bank should be amenable to suit in "garden variety lawsuits", such as the suits already brought in tort and contract, but not in other suits (JA 148). According to Appellee, these "garden variety lawsuits" were "several minor cases involving marginal tort and contract claims" which "because of the issues involved and the small claims at stake * * * do not interfere with the Bank's lending operations or the freedom and integrity essential to the decision-making process of its top management" (BB 16 fn. 7). According to Appellee, suits by bondholders and the beneficiaries of its guarantees pose no threat to the freedom and integrity of the Bank's management (BB 15, 16).

Apparently, Appellee's sole rationale for distinguishing between garden variety and non-garden variety lawsuits is that the Bank considers the former of less importance than the latter, because non-garden variety suits "would interfere with the integrity of the Bank's development lending function, would drain the resources of the Bank in compelling it to defend harassing lawsuits, or would transfer from the board room to the court room * * * essential policy decisions * * *" (BB 15).

Surely, Appellee does not mean there can be provisions in its bond agreements to which the Bank may not be held if their violation involves the judgment and discretion of the Bank's management. Nowhere does the Agreement, the Act or the legislative history limit amenability according to the type or gravity of the action brought (AB 9-11).

According to Appellee, a government would not be immune in a garden variety lawsuit. This is incorrect. Sovereign immunity turns on a defendant's sovereign identity and on whether or not the transaction, from which a claim arises, is one of a commercial or political

nature.[12] The considerations determining whether or not immunity will be granted have nothing at all to do with the cause of action or its gravity, or whether its defense will drain defendant's resources (BB 15).

Appellee suggests that the Bank, with its nineteen Latin American members, is engaged in hemispheric "political considerations", "political relations", "Congressional involvements * * * and what have you" and in formulating foreign policy with the Department of State, and so is entitled to some sort of quasi-sovereign status (JA 143, 144, 146). Such a conclusion is unsubstantiated by the facts. The purpose of the Bank, plainly stated in Article I, Section 1, of the Agreement, is the economic development of its member countries (JA 31). It is not a political organ. Article VIII, Section 5(f) of the Agreement requires that "only economic considerations" can be relevant to its decisions. Moreover, nowhere did Congress give the Bank's officers or Board any power to make or to participate in political decisions affecting the United States.

The Agreement insulates the officers and Board from precisely the considerations and influences which Appellee

12. Even if the Bank could be considered entitled to the immunities enjoyed by foreign governments, it could still be sued under the "restrictive" theory of immunity (AB 14-16). Under this theory private parties may sue sovereign states in our courts on commercial claims. Appellee cites no authority that would make the Bank so sacrosanct that it would not be similarly amenable to suit on this commercial transaction. See *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960); *Et Ve Balik Kurmu* v. *B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd without opinion*, 17 App. Div. 2d 927, 233 N.Y.S.2d 1013 (1st Dep't 1962); *Three Stars Trading Co.* v. *Republic of Cuba*, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961).

Moreover, nowhere does the record indicate that the Department of State has made a suggestion of immunity on behalf of the Bank. Therefore, even if the Bank could be considered entitled to the immunities enjoyed by foreign governments, the District Court need not have refrained from exercising the jurisdiction which it had acquired by valid service of process and under Section 8 of the Inter-American Bank Act. See *Ex Parte Peru*, 318 U.S. 578, 587-88 (1943).

describes. Article VIII, Section 5(d) provides, for example, that the President, officers and staff "owe their duty entirely to the Bank and shall recognize no other authority. Each member of the Bank shall respect the international character of this duty" (JA 49-50).

Nor can the Bank derive vicarious immunity from its sovereign members. It is well established that a corporation is not entitled to sovereign immunity just because it has been formed or incorporated upon a sovereign government's direction, or because all or part of its stock is owned by a government.[13] Moreover, Article XI, Section 2 of the Agreement gives the Bank a juridical personality distinct from that of its members.

Appellee's assumption that suits like the present one "would hardly contribute to [the Bank's] financial reputation or the marketability of its securities" (JA 105) is misconceived. Appellee apparently has not considered that the result of a court decision according immunity in a wide and ill-defined group of cases would be to destroy the confidence in the Bank of all persons dealing with it, be they bondholders, creditors, borrowers or anyone else.[14]

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13. *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575, 580 (1943); *United States* v. *Edgerton & Sons Inc.*, 178 F.2d 763, 764 (2d Cir. 1949); *United States Shipping Bd. Emergency Fleet Corp.* v. *Tabas*, 22 F.2d 398 (3d Cir. 1927); *Asheville Mica Co.* v. *Commodity Credit Co.*, 239 F. Supp. 383, 392 (S.D.N.Y. 1965).

In *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), suit was brought against the defendant for violation of the anti-trust laws. The corporation involved, which was formed and controlled by the French Government for the purpose of administering potash mines, was organized as any other corporation would be under French law and was expressly made amenable to suit. In denying immunity the Court stated:

> "A suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government. . . ." 31 F.2d at 202.

14. "The intrinsic justification of the submission of the I.F.C. and like institutions to ordinary judicial processes lies in the need both to protect and strengthen the confidence of individuals and enterprises in the trustworthiness of the entity." Hahn, *International and Supranational Public Authorities*, 26 Law & Contemp. Prob. 638, 664 (1961).

POINT II

The District Court erred in dismissing the complaint on the merits because the facts alleged by Appellants in support of their claim state more than one cause of action which would entitle Appellants to relief.

The District Court, after deciding it lacked jurisdiction over Appellee, erroneously proceeded to consider the merits of the controversy and to dismiss the complaint for failure to state a cause of action.

Rule 12(b) of the Federal Rules of Civil Procedure, which the Bank invoked on its motion to dismiss, provides:

> "If, on a motion * * * to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment * * *"

The District Court, in deciding the motion, did not exclude any of the matters presented in the parties' affidavits, the documents and briefs, and the arguments made by counsel. This material, included in the Joint Appendix by consent of the parties, is now part of the record on appeal. If the District Court had expressly excluded any of it, Appellants could have moved for leave to amend their pleadings.

On a motion for dismissal or for summary judgment the court has to assume the truth of the facts alleged and to give such facts the interpretation most favorable to plaintiff. *United States* v. *Mississippi,* 380 U. S. 128, 143 (1965). This Court in *Sass* v. *District of Columbia,* 114 App. D.C. 365, 316 F.2d 366, 367 (D.C. Cir. 1963) declared:

> "In appraising the sufficiency of a complaint we follow 'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove

> no set of facts in support of his claim which would entitle him to relief.' [Citing authority]".

Under Rule 54(c) of the Federal Rules, a court is not limited by the relief demanded in the pleading. This rule has been frequently and liberally applied. 6 MOORE, FEDERAL PRACTICE ¶54.62, at 1209 (2d ed. 1965). Appellants should have their day in court if on any of the facts stated in the record they would be entitled to any type of relief.

A. The facts alleged support a cause of action for breach of certain covenants and promises implied in and arising from the Loan Contract of June 14, 1961.

It is well-established that liability is incurred for the breach of implied promises as well as for the breach of express promises. 5 WILLISTON & THOMPSON, CONTRACTS §1293 (rev. ed. 1937); RESTATEMENT, CONTRACTS §5 (1932). Professor Williston clearly explained the circumstances under which covenants or promises are implied:

> "Since the governing principle in the formation of contracts is the justifiable assumption by one party of a certain intention on the part of the other, the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included." 5 WILLISTON, *supra*, §1293 at 3682; see RESTATEMENT, CONTRACTS §5 (1932).

The implied terms of a contract are not "improvised" as stated by the District Court (JA 155). They are derived from the intentions of the parties and the circumstances surrounding the transaction. These intentions and circumstances should be examined in the light of the purposes and objectives of the contract, all as manifested not only by the language of the contract itself, but by

what reason dictates to accord with the requirements of equity and justice. RESTATEMENT, CONTRACTS §5 (1932); 3 CORBIN, CONTRACTS §561 *et seq.* (1960); 5 WILLISTON, *supra,* §1293. In determining whether a covenant can be implied from an agreement, the simple issue is whether, after considering all the circumstances, purposes and objectives relevant to and surrounding the transaction in question, a reasonably prudent promisee could understand that such a covenant was implicit in the agreement.

The circumstances surrounding the June 14, 1961 Loan Contract between Lutcher, S.A. and the Bank must therefore be examined in the light of the purposes and objectives of the loan:

First. In June 1961, Brazil's political and economic instability did not encourage substantial industrial investment (JA 5; BB 3).

Second. Therefore, private sources were reluctant to risk substantial sums in developing new industrial projects such as that of Appellants. Since the Bank is permitted to finance projects only when funds are not available from private sources, it was, as conceded by Appellee, Appellants' last resort as a source of funds (JA 36; BB 18).

Third. The construction of Appellants' pulp plant involved an aggregate investment of over $15,000,000. It required not only erecting a plant and purchasing, procuring and installing all its attendant equipment, but also (i) construction and installation of a 2,500 KW hydro-electric project, (ii) planting extensive forest reserves, (iii) acquiring over 125 trucks with spare parts and support facilities, and (iv) building hundreds of homes, an elementary school, a high school, a hospital and several churches. Thousands of persons depend on this vast complex. Finally, implementation of the project required bulldozing access roads through dense

forests and savannahs to the town, plant and lumber sites. In short, Appellants created an entire community in one of the most remote and inaccessible regions of Brazil (JA 3, 93).

Fourth. Appellants' project was designed to provide Brazil with an additional domestic source of long-fiber paper pulp, which until then had been imported at a great loss of foreign exchange. Therefore, it was necessary to locate Appellants' plant in a remote, undeveloped area of the state of Parana, where pine trees of the appropriate quality grow in abundance (JA 9).

Fifth. Appellants' new, unusual and extensive project, which the Bank encouraged through its June, 1961 financing, was to be located less than 150 miles south of the Klabin group's existing plant in the state of Parana, which was already producing long-fiber pulp. Klabin operated the largest integrated pulp and paper facility in Brazil and maintained a complete monopoly of newsprint (JA 3).

To summarize, this combination of circumstances presented a very special and unusual situation. Relying upon the Bank's support, Appellants invested their own money in this effort for which no other private capital was available. The Bank had full knowledge that the project's success depended upon its ability to meet the competitive challenge of the monopolistic Klabin interests operating within the same general geographical area. Survival of Appellants therefore became dependent upon the Bank's thoughtful, reasoned and considered administration of the Loan Contract. The entire relationship was permeated with the necessity for a spirit of continuing cooperation.

The Bank established a privity and mutuality of interest with Appellants by executing a Loan Contract replete with provisions evidencing a close and special relationship with Appellants (JA 78-81). The Bank acquired beneficial

rights and by the same token assumed duties and obligations to Appellants with respect to the project. Lutcher, S.A. is required under the Loan Contract at all times to permit full inspection of the project, to submit quarterly and annual reports of its operations, and such other reports as the Bank may at any time request respecting the progress of the project (JA 75-76). At the same time, the Bank is required to heed the mandate of Article III, Section 7(a)(iii) of the Agreement to "pay due regard to prospects that the borrower * * * will be in a position to meet [its] obligations under the loan contract" (JA 36). The restrictions placed on the borrower and the inspection rights granted to the Bank reflect the Bank's continuing concern as to the borrower's ability at all times to repay the loan. Indeed, a separate division of the Bank has been created to conduct continuing supervision of loan projects such as that of Appellants.

Appellants contend that, considering the foregoing circumstances and assuming the Bank's good faith in entering into the contract, the Bank implicitly promised, agreed and undertook to give due consideration to the borrower's ability to repay its loan thereunder. This undertaking is clearly implicit in the Loan Contract and must necessarily be derived therefrom by virtue of the application of the rule on implied contracts hereinabove set forth. Appellant does not assert, as alleged by Appellee, that the Bank by implication has agreed "to avoid aiding its [Appellants'] competition" or to treat Lutcher, S.A. as a "preferred ward" (BB 7).

The Loan Contract was executed on June 14, 1961. Appellants proceeded to erect the plant and attendant facilities (JA 3). In November 1961, when Appellants learned that the Bank was considering a $5,000,000 loan to Klabin to erect a new, pulp manufacturing facility in the adjacent state of Santa Catarina, only 200 miles to the south, they notified the Bank that the feasibility study and market analysis relating to the Klabin loan misrepresented

the economics of the Brazilian pulp and paper market (JA 3-4).

Appellants thereby requested the Bank to discharge its implied undertaking to give due consideration to the effect such a loan would have upon Appellants' prospects and their ability to perform under the Loan Contract. The Bank disregarded this plea, and in January, 1962 lent $5,000,000 to the Klabin group without diligently examining the effect thereof upon Appellants (JA 4, 8).

Inherent in every bilateral contract is a covenant by which each party impliedly promises the other party to cooperate fully in attaining the aims of the agreement.[15] As Professor Williston writes:

> "Often, indeed, the situation is such that the cooperation of one party is an essential prerequisite to performance by the other, in which case there is not only a condition implied in fact qualifying the promise of the latter, but, as already stated, an implied promise by the former to give the necessary cooperation." 5 WILLISTON, *supra*, §1293A, at 3687-3688.

The implied provisions are to be read into the contract, and the rights of the parties are to be adjudged as though such provisions were expressed. *Mortgage Corp.* v. *Manhattan Sav. Bank*, 71 N. J. Super. 489, 177 A.2d 326, 332 (1962).

Considerations of good faith and fair dealing aside, it is an established principle of law that in every contract a promisor impliedly covenants that he will himself do nothing which will prevent, obstruct or hinder performance by the other party.[16]

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15. *Rochester Park, Inc.* v. *City of Rochester*, 38 Misc. 2d 714, 238 N.Y.S.2d 822 (Sup. Ct.) *aff'd* 19 App. Div. 2d 776, 241 N.Y.S.2d 763 (4th Dep't 1963); 5 WILLISTON, *supra*, §1293A; 3 CORBIN, *supra*, §570.

16. *J. C. Millet Co.* v. *Distillers Distrib. Corp.*, 258 F.2d 139, 144 (9th Cir. 1958); *Chicora Constr. Co.* v. *United States*, 252 F. Supp. 910, 913 (E.D.N.C. 1965); *American Trading & Prod. Co.* v. *United States*, 172 F. Supp. 165, 167 (D. Md. 1959); *T. C. Bateson Constr. Co.* v. *United States*, 319 F.2d 135, 159 (Ct. Cl. 1963);

Appellants present sufficient grounds to support a cause of action simply by asserting that the Bank violated its implied covenant to give due consideration to the effect upon Appellants' ability to repay their loans and to carry out their project. This violation consisted of making the Klabin loan, allowing Klabin to incur additional indebtedness, and by failing to cooperate with Appellants in developing the Brazilian pulp and paper industry.

The Bank's continuing responsibility to Appellants is further demonstrated by Section 6.12 of the Loan Contract (JA 82). This provision limits the Bank's right to sell all or part of the loan to other public or private institutions. Ordinarily, the determination to sell a loan to third parties would be wholly within a bank's discretion and judgment. Nevertheless, the Bank expressly agreed to give prior notice to Appellants of any contemplated sale, and expressly agreed that its right to sell was "subject to due consideration" of the borrower's interest (JA 82).

B. The facts alleged in the record support a cause of action for breach of the express promise made by the Bank in December 1965, to retain an independent firm to undertake an economic study of Appellants' project and the Brazilian pulp and paper market prior to consenting to Klabin's incurring additional indebtedness.

In late 1965, the Bank was asked to consent to Klabin's incurring additional indebtedness to complete its con-

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Peter Kiewit Sons Co. v. *United States,* 151 F. Supp. 726, 731 (Ct. Cl. 1957); *Chalender* v. *United States,* 119 F. Supp. 186, 190 (Ct. Cl. 1951); 5 WILLISTON & THOMPSON, CONTRACTS §1293A (rev. ed. 1937); 3 CORBIN, CONTRACTS §571 (1960); RESTATEMENT, CONTRACTS §315 (1932). Appellant is not implying a separate contract, as stated by the lower court (JA 155). In *Roebling* v. *Dillon,* 109 App. D.C. 42, 288 F.2d 386 (D.C. Cir. 1961) relied on by the lower court, this Court was concerned with establishing a quasi-contract or contract implied-in-fact between the parties, and not an implied covenant in an existing contract. In *Fort Sill Gardens, Inc.* v. *United States,* 355 F.2d 636 (Ct. Cl. 1966), relied on by the lower court, the Court of Claims merely held it had no jurisdiction because the action sounded in tort, and not in contract, even though it arose out of a contract.

struction of its new long-fiber paper pulp mill in Santa Catarina. Appellants thereupon requested that the Bank prior to giving such consent retain at Appellants' expense an independent firm to study Appellants' project and the Brazilian pulp and paper market. To underline the need for such a study, Appellants referred the Bank to a market study published by the Brazil National Development Bank which indicated that the Brazilian long-fiber pulp market could not accommodate both Appellants and expanded Klabin operations (JA 6-8). The Bank promised to have the aforementioned requested studies of Appellants' project and of the relevant market made if Appellants paid their December 15, 1965 loan installment before the Bank's books were closed for the year.

Relying upon the Bank's representation that it would cause these studies to be made, Appellant Brown, a substantial stockholder of Lutcher, S.A., advanced and continued to advance additional outside funds to the company, so that the then overdue installment could be paid (JA 6-7). However, the Bank subsequently refused to honor its agreement and once again breached its duty to cooperate with Appellants in developing the Brazilian pulp and paper industry.

This refusal also breached an additional agreement which compromised a bona fide dispute concerning the Bank's duties under the 1961 Loan Contract not to hinder Appellants' performance. The extraordinary Brazilian inflation and monetary crisis, the unforeseen political confusion engendered by the Brazilian President's unprecedented and unexpected resignation in August 1961, and Appellee's ill-considered assistance to the Klabin group in a market unable to sustain further expansion could entitle Appellants to request modification of their Loan Contract (JA 5, 136-137; BB 3; AB 32). Since unforeseen difficulties such as this might justify Appellants' non-performance under the Loan Contract as it now

stands, their ultimate payment of the December 15, 1965 installment, made possible by the injection of new capital by Appellant Brown, was sufficient consideration for the Bank's promise to have the market studies made. See *Pittsburg Testing Lab.* v. *Farnsworth & Chambers Co.*, 251 F.2d 77, 79 (10th Cir. 1958); *United States* v. *Hyde Constr. Co.*, 236 F. Supp. 770, 776 (N.D. Okla. 1964); *Lange* v. *United States*, 120 F.2d 886 (4th Cir. 1941); RESTATEMENT, CONTRACTS §76, illustration 8 (1932).

C. The facts alleged in the record support a cause of action on the ground that the Bank, acting with full knowledge that it would cause the economic ruin of Appellants, committed tortious acts.

Relying on the Bank's promise of economic help, Lutcher, S.A. invested all its capital in a distant and undeveloped region of Brazil. Also relying on the Bank's promise, Appellant Brown extended credit in considerable amounts to Lutcher, S.A. The Bank was fully aware of these facts, and a much closer relationship than the one normally existing between creditor and debtor was necessarily established to carry the complex project to completion.

Having thus encouraged Appellants to expand their participation in the Brazilian pulp and paper industry, the Bank without giving due consideration to Appellants' protests, subsequently loaned $5,000,000 to the giant, fully-integrated Klabin group and consented to this group's increasing its indebtedness to further the expansion project contemplated in the initial loan. These tortious acts, committed with full knowledge of their consequences, without justifiable cause, damage Lutcher, S.A. by leaving it unable to retain customers, to obtain credit, or to attract additional investors (JA 8).

Where such a close contractual relationship exists between two parties, and at the same time a duty arises

out of the circumstances surrounding or attending the transactions contemplated by the relationship, the breach of that duty is a tort. 52 AM. JUR., TORTS §26 (1944).

In view of these circumstances set forth in sub-points A, B and C above, Appellants' common law right to bring this action is in no way comparable to the statutory standing discussed in all the cases cited by Appellee (BB 10). Appellants are not seeking to enjoin a Federal agency or branch of the United States Government from using their statutory power, but are seeking to enforce rights arising out of a contract entered into with the Bank and to impose liability for tortious conduct of the Bank committed within the orbit of its special relationship with Appellants.

POINT III

The District Court erred in finding Klabin was an indispensable party.

The subject of "indispensable party" (BB 19) was not raised by Appellee in the court below. It was first mentioned in response to an inquiry from the bench during oral argument (JA 143). If Klabin were an indispensable party, the court could have ordered its joinder on such terms as would be just under Federal Rule 21, but Appellee would not have been entitled to the dismissal of the complaint. See *Electronic Publishing Co.* v. *Zalytron,* 226 F. Supp. 760, 761 (S.D.N.Y. 1964).

However, Klabin, though absent, was not indispensable. Where the contractual interests before the court are not so interwoven with interests not represented that it is more equitable to proceed to an adjudication than it is to leave the matter unadjudicated, the absent party is not indispensable. *Ward* v. *Deavers,* 92 App. D.C. 323, 203 F. 2d 72 (D.C. Cir. 1953); 6 MOORE, FEDERAL PRACTICE ¶19.07 (2d ed. 1956).

Conclusion

The decision of the District Court should be reversed and remanded because (i) the District Court has jurisdiction of the Bank; and (ii) the complaint and documents forming the record on appeal set forth facts which would support a cause of action which would entitle Appellant to relief. Or, alternatively, this Court should direct the District Court to grant Appellants leave to amend their complaint.

Respectfully submitted,

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BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20166

LUTCHER S.A. CELULOSE E PAPEL and F. LUTCHER BROWN,

Appellants,

—v.—

INTER-AMERICAN DEVELOPMENT BANK,

Appellee.

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee:

(1) The first question is whether, separate and apart from defendant's statutory immunity, a borrower may sue a bank to enjoin that bank from aiding the borrower's competitors.

(2) The second question is whether defendant is immune from such suit.

(3) The third question is whether appellants' competitor is an indispensable party.

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No. 20166

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Inter-American Development Bank,

Appellee.

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

COUNTER-STATEMENT OF THE CASE

Appellee Inter-American Development Bank (hereafter the Bank) is a public international financial institution. Its legal existence began on December 30, 1959. The Bank was organized pursuant to the Agreement Establishing the Bank (J.A. 25-64). The United States was and is a party to this Agreement—as are each of the nations of Latin America with the exception of Cuba. The Bank is dedicated to the promotion of investment within its member countries and to the financing of Latin America's economic and social development under the Alliance for Progress (J.A. 25 *et seq.*).

The Bank's capital is composed of "ordinary capital" subscriptions by the member nations, as well as by con-

tributions from member countries to the Fund for Special Operations. In addition, the Bank administers the Social Progress Trust Fund established by the United States (J.A. 19-20). As part of its ordinary capital operations, the Bank has marketed a number of bond issues in various nations of Europe as well as in the United States. These resources, as of December 31, 1965, had been committed for some 326 loans. The outstanding loans on that date exceeded $1.5 billion for projects, the total cost of which exceeded $4.5 billion. The Bank's lending rate has been something over $300 million a year in the approximately five calendar years of its existence (J.A. 20-21). All loans are made for projects in Latin America. Loans have been made both to governments and to private borrowers in a wide variety of fields and for a wide variety of development purposes in Latin America. For social development, the Bank has financed low-income housing, water supply and sewage projects, improvement in land use and tenure, and education (J.A. 22). In more traditional economic areas, the Bank has made a substantial number of loans to public and private entities for the development of the electric power facilities of Latin America, for transportation, for agriculture, for mining—and for industry.

This litigation involves one of the first loans made by the Bank in the industrial field. The loan to Lutcher S.A. Celulose e Papel (hereafter Lutcher S.A.) for $4,700,000 was signed on June 14, 1961 (J.A. 65)—and later supplemented by a further loan of $4,000,000 on May 1, 1964 (J.A. 85). The loans were to finance the construction of a cellulose pulp mill and related facilities by Lutcher S.A. in the state of Parana, Brazil. The loan agreements contain no assurance that the Bank would not finance other pulp industries in Brazil. Nor do they contain representations

as to the Latin American pulp market, as to the appropriate level of pulp manufacturing competition, or as to the proper number of competitive pulp plants.[1] The Bank did not agree that it would use its best efforts to insure Lutcher S.A. a monopoly or protected status in Brazilian pulp. The risk of competition was assumed, as is customary in loan financing, by the borrower, not the Bank. The Bank agreed to lend. The borrower agreed to use the loan to build its plant and to repay its debt. This is the long and short of the loan. The master agreement did provide, however, that "any controversy between the Bank and the Borrower under this Agreement . . . shall be submitted for decision by an Arbitral Tribunal . . ." (J.A. 82).

The Bank performed its obligations under the loan agreements. Appellants complain of no breach of the written contracts. The project, however, did not have a happy history. The plant was installed in a "remote and undeveloped area," (Br. 27), "through one of the most tumultuous periods in [Brazil's] history . . ." (Br. 26, 27). It is not a success. One may assume that Lutcher's best management, financing and administrative talents were unequal to the task of building a profitable pulp mill at least under these conditions. One may also assume that there were a host of reasons—the nature of the market, the effectiveness of competition, the monetary crisis in Brazil—for the failure of the project, and that these were wholly or largely beyond the Bank's control in the best of circumstances.

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[1] Nor would it have been appropriate that the loan contracts contain such representations. The Bank's obligations and responsibilities to its members would preclude such a restrictive posture. In view of its purpose as set forth in its charter, " . . . to contribute to the acceleration of the process of economic development of the member countries . . . ." (J.A. 31), the Bank might well find it beneficial to make loans to many enterprises in a given field of endeavor.

Appellants charge, however, that the Bank failed to "assist Lutcher S.A. and by all means avoid any direct action detrimental to Lutcher S.A.". (Br. 27-28). Specifically, they urge that the Bank failed to "avoid any direct action detrimental to Lutcher S.A." by making a loan to the Klabin group to finance a competitive pulp plant in Brazil in 1962 (though, as appellants point out, this 1962 loan to Klabin has not yet been used for the construction of the competitive plant and hence has not actually diverted any pulp market from Lutcher S.A.); by making another loan to a putative pulp competitor in Chile in 1963; by failing to conduct a market study appellants think should have been made (Br. 28-29),—and by a generally "inconsiderate attitude" (Br. 28).

Earlier this year the Klabin group, Lutcher S.A.'s major competitor, was in the process of reorganizing its finances and borrowing additional capital from third parties. To expand Klabin's capacity would, according to the complaint, "perpetuate and compound" the Bank's own 1963 error in lending directly to Klabin (Cplt., para. 13; J.A. 8). Appellants therefore sought the aid of the Court to stop the Bank from allowing Klabin to raise the new capital from third parties. The complaint asked for injunctive relief to prohibit the Bank from "giving clearance to the Klabin group to incur additional indebtedness to construct a new pulp and paper facility for the term of defendant's loan with plaintiff Lutcher S.A." (J.A. 10). For good measure, appellants asked for various subsidiary injunctions against the Bank, to block it from financing any other pulp or paper facility in Brazil, from disposing of records, from transferring employees out of the jurisdiction, and from transferring funds. The Bank moved to dismiss ten days after the complaint was filed. (J.A. 18). Judge Gasch entered an

order dismissing the complaint and denying the injunction, on March 25, 1966 (J.A. 151).

Since the entry of the order dismissing the complaint, the Bank has agreed not to oppose Klabin's expansion program and has rescheduled its own loan to Klabin so as to be consistent with the current circumstances of the project. Presumably the Klabin group is now moving ahead in its expansion program, but actual production is some two years away.

STATUTES, EXECUTIVE ORDERS AND AGREEMENTS INVOLVED

The relevant statutes, executive orders and agreements involved here are set out in material part at J.A. 97-101.

SUMMARY OF ARGUMENT

1. Plaintiffs have no standing to sue and no cause of action. Having borrowed money from the Bank, they seek to enjoin the Bank from assisting their competitors—and to penalize the Bank for past assistance. No such suit would lie against a private, domestic bank with respect to a competitive struggle within the United States. Here, the case for dismissal is even stronger. The issues involve competition in a foreign market, and the lending policies of an international public financing agency.

2. The Bank is immune. A pattern of inter-related immunity provisions in the International Organizations Immunities Act, the Agreement Establishing the Bank and Executive Orders compels the conclusion that, though the Bank is subject to suit by those who hold its bonds, and has

not asserted immunity in minor tort and contract cases, it may not be compelled by a borrower to defend the loan policy decisions of its officers and board in court.

3. The essential contest is between the two Brazilian pulp manufacturers. Appellants' competitor is an indispensable party.

ARGUMENT

I. PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND HAVE NO STANDING TO ENJOIN THE BANK FROM AIDING APPELLANTS' COMPETITORS.

This proceeding seeks to enjoin the Bank in respect of its lending policies to the private pulp industry in Latin America. As we shall show, appellants have no standing and no cause of action.

Appellants' claim—that the Bank exposed itself to injunctive relief and damages by its efforts to develop the pulp industry in Latin America—must necessarily arise outside the contract.[2] They suggest that when it made the loan to Lutcher S.A. in 1961, the Bank incurred an "implied obligation" to act "prudently" in relation to their competitors. Appellants summarize the unwritten standard of Bank conduct they seek to enforce as follows: "As a Development bank, the Inter-American Bank should have assisted Lutcher S.A. and by all means avoided any direct action detrimental to Lutcher S.A." (Br. 27-28).

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[2] Had the dispute arisen under the loan contracts, the provisions of the original loan contract would have required submission of such dispute to arbitration (J.A. 82). Since this litigation is outside the terms of the contracts between the Bank and Lutcher S.A., the appellants correctly did not resort to this procedure.

This means, if we interpret the brief correctly, that Lutcher S.A., by virtue of its position as the first borrower from the Bank in the pulp industry in Brazil, acquired unwritten but extremely powerful rights against the Bank. The Bank was thereafter obligated to assist Lutcher S.A. "by all means," and to eschew assistance to Lutcher's competition. Appellant would have this court find that in signing its loan agreement with Lutcher in 1961, the Bank was undertaking not only to perform the specific commitment to make the loan, but also an implied obligation—over and above the loan agreement and enforceable in the courts by the drastic remedy of injunction—to avoid aiding its competition. In effect, it is alleged that Lutcher S.A. should be regarded as a preferred ward of the Bank. The Bank was obligated to Lutcher S.A. not only to disburse the money it agreed to lend, but also to give special preference and solicitude. Whatever the conditions of the market, it must "avoid any direct action detrimental to Lutcher S.A.".

The Bank's reply to this is simple and straightforward. As we shall show, such a claim does not give rise to a cause of action in the courts of the United States and appellants had no standing to enjoin—or seek money damages for—Bank lending actions which may benefit the competition.

1. The case is analogous, though stronger for reasons which we shall subsequently set forth, to a suit by a borrower against a private, domestic bank to enjoin that bank from making loans to plaintiff's competitor. Appellants could not bring such a claim against the National City Bank of New York, had they secured the debt financing they needed in 1961 from the National City Bank rather than from the Inter-American Development Bank. Unless

the National City Bank had entered into an unusual self-restraining contractual obligation—and there is no such claim here—the National City Bank would have retained full discretion to lend thereafter to a competitor of appellants and to make up its own mind in its own way about economic conditions in the pulp market in Brazil. The fact that appellants had once borrowed from the National City Bank would not have given them a cause of action against a National City Bank loan to appellants' competitors in 1966. So much is elementary, and we have found no other case in which a borrower tried to proceed against a private bank to enjoin a loan to a competitor.

It happens, however, that the substance of the question was discussed by the Supreme Court in *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938). Petitioner there was a power company in Alabama. Respondent, as Administrator of the Federal Emergency Administration of Public Works, under the NIRA, was authorized to make loans for public works projects. Respondent agreed to finance the construction of electric distribution systems in four Alabama municipalities. Petitioner sued to enjoin the agreements. Petitioner alleged that its business would be damaged if the competing plants were built, and charged that the loans were illegal. The Supreme Court upheld the dismissal of the action. Even if the loans were unlawful and beyond the statutory authority of the defendant—a claim far beyond any pressed here—plaintiff had no standing and no cause of action:

> "The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys . . . presents a clear case of *damnum absque injuria* . . . .

"The ultimate question which, therefore, emerges is one of great breadth. Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. And that question suggests another: Should the loan be consummated, may such a one sue for damages? If so, upon what ground may he sue either the person making the loan or the person receiving it? Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose. If such a suit can be maintained, similar suits by innumerable persons are likewise admissible to determine whether money is being loaned without lawful authority for uses which, although hurtful to the complainants, are perfectly lawful. The supposition opens a vista of litigation hitherto unrevealed.

"John Doe, let us suppose, is engaged in operating a grocery store. Richard Roe, desiring to open a rival and competing establishment, seeks a loan from a manufacturing concern which, under its charter, is without authority to make the loan. The loan, if made, will be *ultra vires*. The state or a stockholder of the corporation, perhaps a creditor in some circumstances, may, upon that ground, enjoin the loan. But may it be enjoined at the suit of John Doe, a stranger to the corporation, because the lawful use of the money will prove injurious to him and this result is foreseen and expected both by the lender and the borrower, Richard Roe? Certainly not, unless we are prepared to lay down the general rule that A, who will suffer damage

> from the lawful act of B, and who plainly will have no case against B, may nevertheless invoke judicial aid to restrain a third party, acting without authority, from furnishing means which will enable B to do what the law permits him to do. Such a rule would be opposed to sound reason, as we have already tried to show, and cannot be accepted." 302 U.S. 479-81.[3]

Appellants suggest a distinction between this case and those discussed in *Alabama Power*. Lutcher S.A., they say, acquired standing by virtue of the fact that it was a borrower from this Bank. The 1961 Bank loan established "privity." This assertion is not founded on any specific clause of the loan agreements since they contain nothing which supports the kind of special wardship obligation appellants seek to involve here. (Br. 25, n. 46). Moreover, whatever special rights or privileges appellants acquired by virtue of the loan agreement, are dischargeable through arbitration.[4]

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[3] See also *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 277, 225 F.2d 924, 928 (D.C. Cir.), *cert. denied*, 350 U.S. 884 (1955); *Texas State AFL-CIO* v. *Kennedy*, 117 U.S. App. D.C. 343, 330 F.2d 217 (D.C. Cir.), *cert. denied*, 379 U.S. 826 (1964); *Pennsylvania R.R.* v. *Dillon*, 118 U.S. App. D.C. 257, 335 F.2d 292 (D.C. Cir.), *cert. denied*, 379 U.S. 945 (1964); *Berry* v. *Housing and Home Finance Agency*, 340 F.2d 939 (2nd Cir. 1965).

[4] Appellants also refer to *Atchison, Topeka & S.F. Ry. & Co.* v. *Summerfield*, 97 U.S. App. D.C. 203, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956) (Br. 25, n. 46). That case distinguished the *Alabama Power Co.* situation by pointing out that the "Postmaster General did not simply finance or create new competition; he explicitly discontinued the use of certain railroad equipment." (97 U.S. App. D.C. at 205; 229 F.2d at 779). Here, the Bank stands accused only of creating new competition—and "imprudently," not unlawfully, at that. Had the Bank affirmatively discontinued the loan, refused to make a disbursement or failed to comply with its other affirmative commitments in the

The Court below summarized the point effectively. There is no cause of action and no standing arising from implied contract against even a private financing institution when "one of two competing customers [of a bank] allege[s] that the Bank had imprudently loaned money to the second customer and thereby made more difficult the [first] customer's obligation to respond" (J.A. 154).

2. The point is even stronger here than in the case of a private domestic bank, as we shall now show. Essentially, appellants seek to compel the Bank to defend in court its economic judgments in respect of pulp competition in Brazil—and, indeed, throughout its Latin American member countries. The Bank, by its charter, is obligated to make loans to public and private industry in Latin America. It was created and financed for the sole purpose of stimulating the economic and social development of Latin America. But whether to make loans, to what private industrial sectors in Latin America the loans should be made, the terms of the loans and the criteria of performance to be exacted of Latin American borrowers are difficult and sensitive issues, requiring not only a technical knowledge of the economics of a variety of industries in Latin America but, as well, an even broader sensitivity to problems of institutional growth, education, labor, transportation of raw materials and finished products, foreign exchange resources, the fiscal and monetary practices of the nations of Latin America, and the public policy of each in respect of competition and monopoly. The essential issue before the Bank here was the size, capacity and growth prospects of the

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Lutcher S.A. loan agreement the posture of the case would have been different. And appellants would have had an avenue of relief under the arbitration provisions of the contract 1961 loan agreement. In any event, the remedy would not have been a suit for injunction.

Brazilian pulp market. It is hard enough to justify an injunction against a private, domestic lending institution when the purpose of that injunction is to effect the equation of industrial competition within the United States. Appellants seek to inject the courts of the United States into matters of refined economic judgment about pulp markets in Brazil, by way of a suit against a public, international lending agency. In our view, they have stated an even less appealing course of action, and have even less standing, than in *Alabama Power*.

3. In fact, we go further. For such a cause of action to find refuge in the courts would have most serious consequences for the Bank and its work. Appellants suggest that the District Court should examine the Bank's 1962 loan to Klabin, the Bank's alleged failure in 1966 to undertake Brazilian pulp market studies and the Bank's willingness to allow Klabin to expand its Brazilian pulp output. If appellants have standing and a cause of action to litigate these questions here, then Klabin presumably can litigate the same issues in a Brazilian court. A United States court might determine that the Bank acted "imprudently" in lending to Klabin and enjoin the Bank from giving it any further aid and comfort. A Brazilian court could as easily probe the economics of the Brazilian pulp market at Klabin's behest and decide that the Bank should have given even greater aid to Klabin. (Indeed, if anything, Klabin's case would be stronger; the Bank's role is to promote economic and social development.) If one borrower has a cause of action to litigate the Bank's lending policy, then other borrowers must also presumably have causes of action.[5] So the Bank, if subject to injunctive relief in

[5] Unless, that is, a first borrower acquires a monopoly on the Bank's custom. It may be that appellants go this far.

this case, would also be exposed to conflicting court orders from other jurisdictions where competitors of appellants might seek relief. The notion that the Bank's lending decisions can be tested in all the courts of the Hemisphere by dissatisfied competitors could scarcely have been contemplated by the nations which organized the Bank.

The Bank bears a heavy responsibility. It is the bank of the Alliance for Progress, the lending institution designed, built up and administered to support the economic and social development of Latin America. Its task of development diplomacy is difficult enough. But had the Court below held that a borrower, such as appellants, can submit the "prudence" of the Bank's lending policies in Brazil to judicial test, this would have represented a dangerous precedent indeed for the work of the Bank. We urge that appellants have no standing and no cause of action, and that the dismissal of the complaint be affirmed.

II. THE BANK IS STATUTORILY IMMUNE FROM SUCH A SUIT.

The Bank is a creature of international agreement and as such is immune from this action, as we shall now show. The International Organizations Immunities Act (J.A. 97-98) was enacted in 1945. It provided, in Section 2(b), that the property and assets of designated organizations would have "immunity from suit and every form of judicial process as is enjoyed by foreign governments . . . " The immunity was qualified insofar as the organization itself might explicitly waive it "for the purpose of any proceedings or by the terms of any contract."

The 1959 Agreement Establishing the Bank, in Article XI, Section 2 (J.A. 98-99), provided that the Bank could make contracts, hold property and, specifically, that it had

the juridical capacity to institute litigation. Article XI, Section 2, was silent as to suits against the Bank. Article XI, Section 3 provided that suits against the Bank might not be instituted by members, that in no event could property be attached before final judgment and that such suits as lie could be instituted "only" in certain fora: —those where the Bank had an office, had appointed an agent or had sold or guaranteed securities.

In authorizing the President to accept membership in the Bank, Congress, as in the case of other international financial institutions, made explicit provision in Section 9 of the Inter-American Development Bank Act that the immunity provisions of the Agreement Establishing the Bank "would have full force and effect" in the United States. Section 9, Inter-American Development Bank Act (J.A. 100). The President designated the Bank an international organization within the terms of Section 1 of the International Organizations Immunities Act, by Executive Order 10873, April 8, 1960, as amended by Executive Order 11019, April 27, 1962. (J.A. 100-101)[6] The Order provided that the designation "shall not be deemed to abridge in any respect privileges, exemptions and immunities which that organization may have acquired . . . by . . . congressional action." The 1962 Executive Order amendment provided that the designation would also not affect the immunity provisions of Article XI, Section 3 of the Agreement Establishing the Bank.

Appellants suggest that Section 3 of Article XI of the Agreement Establishing the Bank represented a waiver

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[6] In its final form the Bank's designation is now identical to that of the World Bank's, for which see 3 C.F.R. 1943-1948 Compilation, p. 558.

of all immunities (Br. 9-21). This would wipe out Section 2(b) of the Immunities Act. It is not necessary to go so far. The purpose and effect of the complex of statutory, international agreement and executive order provisions is this. The Bank is vulnerable to suit by its bondholders, and other like creditors and the beneficiaries of its guarantees, since in such cases its vulnerability contributes to the effectiveness of the Bank's operations. The Bank is not subject to litigation where that litigation would interfere with the integrity of Bank's development lending functions, would drain the resources of the Bank in compelling it to defend harassing lawsuits, or would transfer from the board room to the court room the essential policy decisions which the nations participating in the Bank entrusted to its officers and board.

Thus, for example, the Agreement Establishing the Asian Development Bank provides that Asian Bank is to "enjoy immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities, in which cases actions may be brought against the Bank in a court of competent jurisdiction . . ." *Asian Development Bank Act, Hearing before the Senate Foreign Relations Committee on H.R.* 12563, 89th Cong., 2d Sess. 97 (1966). As the U.S. Treasury Department Special Report on the Proposed Asian Development Bank said (*Id.*, at 124, 129), "The Articles of the Charter [of the Asian Development Bank] relating to status, immunities, exemptions and privileges . . . are similar to those embodied in the charters of the World Bank and the Inter-American Development Bank. . . ."

So here. The Inter-American Development Bank may be sued by those who hold its bonds. This is appropriate, since the marketability of the Bank's bonds depends on the clear understanding of a purchaser of those bonds that he can enforce the Bank's debt in the courts of the nations where the Bank has emitted those bonds. See Article XI, Section 3, Agreement Establishing the Bank (J.A. 98). There is no threat to the freedom and integrity of the Bank's management in such suits. The only issue is whether the Bank is in default and has an obligation to pay.[7]

Not so with suits such as this. It can hardly be said that a borrower from the Bank would regard it as essential to his purposes that he be in a position to force the Bank to submit to judicial process. The Bank's obligations to its borrowers are discharged, for all practical purposes, when it has disbursed the monies it promised, and the Bank's loan agreements universally provide that disputes between the Bank and its borrowers are to be submitted to arbitration.

At the same time, complaints such as appellants' open up a serious threat to the integrity of the Bank's management decision process. Appellants seek to litigate the wisdom of the Bank's earlier loans to their competitors, and the Bank's recent approval of Klabin's expansion program. Such a challenge goes to the heart of the Bank's operations. It would seek judicial review, as the Court below said, of "the discretion and judgment of the Bank's gov-

[7] The Bank, furthermore, has been sued, and has not pleaded sovereign immunity, in several minor cases involving marginal tort or contract claims against the Bank and its Washington headquarters. (J.A. 138). Such suits, because of the issues involved and the small claims at stake, also do not interfere with the Bank's lending operations or the freedom and integrity essential to the decision-making process of its top management.

erning board in matters of economic policy closely associated with consideration of international politics . . . " (J.A. 154).

We read the instruments through which the Bank was established as providing for mutual self-restraint on the part of the nations participating in the Bank. The Bank's affairs are to be placed in the hands of its officers and Executive Board. The members of the Executive Board are representatives of the member governments (J.A. 46-50). The nations which agreed to establish the Bank committed themselves to abide by the judgments of those officers and Board, and not to subject those judgments to review and interposition by their own courts. The pull and tug of national interest was remitted to the multinational board room, not to national court rooms. Such a guarantee of independence was essential.

This reading of the purpose and effect of the immunity provisions is reinforced by other sections of the Bank's Charter. Directors and officers are immune from suit; communications are privileged; the Bank's archives are inviolable; its assets are immune from expropriation. The obvious purpose, running like a common thread through the Agreement, is to maintain the integrity, freedom and responsibility of the Board and officers to make the policy judgments essential to the Bank's lending operations, without fear that they—or the Bank itself—might be compelled to answer for these judgments in court. This is the compact among the nations who agreed to establish the Bank. The immunity provisions of the Immunities Act and the Bank Agreement are intended to protect this compact and to insure the freedom and integrity of the Bank's sensitive loan policy process. The Bank is and should be immune from suits by borrowers to challenge its loan actions.

Appellants point to the relatively modern international legal doctrines of "restrictive" immunity (Br. 19 et seq.). They suggest that the Bank ought to be subjected to litigation because the Bank is acting in a private or "commercial" capacity.

The Bank is a bank. But to suggest that it is a commercial institution is to ignore the origin, purpose and operation of the Bank. It is a creature of an agreement between sovereign nations. Its stock is held only by those nations. Its board is composed of nominees of governments. It raises its capital through contributions from governments and markets its securities on the basis of government guarantee. Its stated objectives are those of public policy: —to assist in the economic and social development of the Hemisphere. Its lending criteria are not financial gain but broader objectives of national growth and international cooperation. Its loans are a form of special assistance to projects in Latin America which cannot find financing from commercial sources and which will contribute to the economic and social development of the Hemisphere. The Bank is not commercial and it is not deprived of its essential policy-making immunity under the "restrictive immunity" doctrine.[8]

This suit seeks to compel the Bank to defend the "prudence" of its decisions to lend to appellants' competitors

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[8] Appellants also place some emphasis on *Western Colorado Power Co.* v. *PUC of Colorado,* —— Colo. ——, 411 Pac. 2d 785. (Colo. Sup. Ct. 1966) (Br. 25). This is a garden variety public utility certification proceeding. The Colorado Supreme Court reversed the issuance of the certificate by the state commission in part because the Commission failed to consider certain market evidence. This would be powerful precedent if the lending decisions of private banks—and of the Inter-American Development Bank—were statutorily subject to judicial review in the same fashion as certification decisions of state public utility commissions.

in the Brazilian pulp market and to allow one of those competitors to seek additional capital from other sources for expansion. The Bank is immune.

III. KLABIN IS AN INDISPENSABLE PARTY.

We also suggest that Klabin, as the court below pointed out, is an indispensable party to this nonexistent lawsuit. The ultimate target of the litigation is Klabin and its potential competition with appellants for the Brazilian pulp market. The real relief sought is against Klabin. The complaint seeks to use the Bank as a conduit to frustrate Klabin's expansion program—or to recover damages as a penalty for the Bank's support for that expansion program. Appellants are apparently proceeding against the Bank only because they are indebted to it—and because the Bank is in Washington.

The Bank in fact is now an innocent bystander. The original complaint sought an injunction against the Bank's permitting Klabin to seek new capital and expand his competitive facilities. The Bank has now granted that permission. Its future role in the competitive struggle is marginal at best. Since the actual contending interests are the two competitors, they are both essential parties—if there be a cause of action of any sort, which we respectfully but emphatically suggest there is not.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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August, 1966

PETITION FOR MODIFICATION OF JUDGMENT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20166

LUTCHER S.A. CELULOSE E PAPEL,

and

F. LUTCHER BROWN, *Appellants*

v.

INTER-AMERICAN DEVELOPMENT BANK, *Appellee*

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTER-AMERICAN DEVELOPMENT BANK, *Appellee*

PETITION FOR MODIFICATION OF JUDGMENT

Appellants hereby petition that the judgment of affirmance entered herein on July 13, 1967, be modified so as to specify that the affirmance is without prejudice to the right of the District Court to entertain a motion to amend the complaint. The judgment of affirmance was predicated upon the Court's opinion of July 13, which rejected the District Court's position that the complaint should be dismissed for lack of jurisdiction, but upheld the District Court's position that the complaint failed to state a claim upon which relief can be granted.[1]

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[1] Appellants through new counsel and with the consent of appellee, moved for an extension of time in which to file either a petition for rehearing or an application for modification of judgment. Appellants' motion was granted by this Court's order of August 10, 1967, for a period of ten days from the date of the order.

The grounds for this petition are as follows:

1. Under Rule 15 of the Federal Rules of Civil Procedure for the United States District Courts, leave to amend a complaint "shall be freely given when justice so requires." Accordingly, when a complaint is dismissed for failure to state a cause of action the order of dismissal commonly grants leave to file an amended complaint, or such leave is readily granted upon plaintiff's motion. The policy of liberal amendment practice under Rule 15 is illustrated by *Foman v. Davis,* 371 U.S. 178, 182 (1962):

> "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2d ed. 1948), §§ 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'"

See also 3 Moore, Federal Practice, § 15.08[2] (2d ed. 1967) and authorities there cited. *Cf. Jones v. Kennedy,* 2 F.R.D. 357 (D.D.C. 1942), where leave to file a third amended complaint was denied, but only after the plaintiff's second amended complaint had been dismissed with leave to amend, and the plaintiff had declined to amend and had appealed from the order of dismissal.

2. In the instant case there was no opportunity to amend the complaint once the District Court had determined that it failed to state a cause of action. For the District Court had already ruled that the Court had no jurisdiction to entertain the complaint. This ruling would have made futile any provision for leave to amend in the order of dismissal or any motion for such leave after the dismissal order had been entered.

3. This Court has determined in its opinion of July 13 that the defendant-appellee's claim that the District Court lacked jurisdiction was erroneous. Since appellee prevailed upon the District Court to sustain the erroneous jurisdictional challenge, and thereby precluded the opportunity for amendment to the defective pleading on the merits, it would be in the interest of justice to afford appellants an opportunity to amend their complaint now that the District Court's jurisdiction over the complaint is established.

4. This Court has power either itself to grant leave to amend or to provide that its judgment of affirmance is without prejudice to the District Court's entertaining an application for leave to amend. 3 MOORE, FEDERAL PRACTICE, § 15.11.[2] Appellants here request the latter, more limited relief. This would restore the situation that would have prevailed had the District Court dismissed the complaint for failure to state a claim but not erroneously sustained the defendant's attack upon the District Court's jurisdiction.

Precedent establishes the Court's power to render the type of judgment requested. *Sheridan-Wyoming Coal Co. v. Krug*, 83 U.S. App. D.C. 162, 168 F.2d 557 (1948), 84 U.S. App. D.C. 288, 172 F.2d 282 (1949). There the defendant had successfully moved to dismiss the complaint for failure to state a claim, on the ground that plaintiff had no standing to sue.[3] This Court "affirmed the judgment of the District Court but in the mandate gave that court authority to entertain a motion to amend the complaint." 84 U.S. App. D.C. at 289, 172 F.2d at 283. The mandate of this Court included in pertinent part the language:

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[2] *Accord:* 14 Encyclopedia of Federal Procedure, § 68.92 (3rd Ed., 1965 Revised Vol.):

> "... it is established that where such relief is appropriate, the appellate court will on remand direct amendments of the pleadings, or remand with leave to amend, or reserve leave to the lower court to permit such amendment."

[3] In that respect the defendant's argument was similar to the argument on standing advanced by appellee herein, and like it, was based upon *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938), "and similar cases." *See* 84 U.S. App. D.C. at 289, 172 F. 2d at 283.

"with leave to the District Court to dispose of such motion, if made, in such manner as in its discretion seems proper." 84 U.S. App. D.C. at 290, 172 F.2d at 284. Appellants ask a similar mandate herein.

Further authority that the Court may prescribe the requested form of judgment appears from *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 88 (2d Cir. 1961). There the Court of Appeals, in affirming dismissal of a complaint, noted its power to "state that affirmance is without prejudice to the District Court's entertaining an application to amend", but the appellate court declined to exercise that power because the test of Rule 15(a), F.R.C.P., was not met in the case before it. *Cf. Bryan v. Austin*, 354 U.S. 933 (1957). There a three-judge district court had declined to exercise jurisdiction over the complaint (in comparison with the instant case where the district court ruled that it could not exercise jurisdiction). The three-judge court stayed the proceeding pending a test in the State courts of the constitutionality of the segregation statute challenged by plaintiffs. Pending appeal to the Supreme Court the statute was repealed. But the Supreme Court did not dismiss the appeal as moot, as the appellees sought. The Supreme Court enabled the District Court to exercise its jurisdiction by remanding "with leave to the appellants to amend their pleadings . . . Rule 15 of the Federal Rules of Civil Procedure." *See also Champ v. Atkins*, 76 U.S. App. D.C. 15, 129 F.2d 601 (1942). There this Court in its original ruling held that the complaint should be dismissed, reversing the District Court's summary judgment for plaintiff-appellees. On petition for rehearing, this Court specified that its ruling was "without prejudice to the right of the District Court, if it deems that justice so requires, to permit appellees to amend their complaint. *Cf.* F.R.C.P., Rule 15(a) . . . ." 76 U.S. App. D.C. at 17, 129 F.2d at 603.

5. The filing of an amended complaint would be particularly appropriate in the instant case. Here the original

complaint necessarily was hurriedly prepared, since the plaintiffs were seeking a preliminary injunction against imminent action of the defendant. (*See* JA 8, 13.) No doubt due to this time pressure, the complaint was essentially in narrative form and contained what appellee below described as "substantial argumentative material inappropriate to civil pleading." (JA 101.) There was scant opportunity for amendment below due to the speed with which the matter progressed to hearing and judgment. The complaint was filed on March 4, 1966, and served on March 7. (JA 1.) Defendant's motion to dismiss the complaint was filed March 14, and plaintiff's opposition thereto was filed March 21. (JA 1.) The motion to dismiss the complaint and the motion for preliminary injunction were heard on Friday, March 25, 1966. (JA 126.) At the hearing defendant's counsel sought "dismissal as quickly as is convenient." (JA 143.) Later the same day, the Court signed its order granting the defendant's motion to dismiss (JA 151) and rendered its written opinion. (JA 151-55.) Thus only three weeks elapsed from the filing of the complaint to the signing of the order for its dismissal.

6. The opinion of this Court shows the need for Appellant Brown to file an amended complaint in order properly to allege an individual cause of action. In rejecting the attempt to predicate a cause of action upon defendant's alleged "failure to carry out an alleged promise to make a market study . . .", the Court held:

> "The complaint alleges that in reliance on the promised market survey Brown personally advanced funds to Lutcher, which made payments due the Bank on its loans . . . That Brown individually acted to his detriment, as he claims, by advancing additional funds to his corporation is not enough; *individually he alleges no contract with the Bank in relation to the financing program.* All relations between Lutcher and the Bank rested on formal loan contracts; accordingly Brown's individual action in putting new funds into

> his corporation, even if influenced, as his brief argues, by the promised market survey, does not give rise to a cause of action." (Slip opinion, pp. 12-13; emphasis supplied.)

Appellant Brown desires to file an amended complaint properly alleging that the Bank's promise to conduct the market survey ran to Brown individually (as well as to the Lutcher S.A. corporation). This would enable him to plead a cause of action upon a "contract with the Bank in relation to the financing program" because the Bank and appellant Brown knew that Lutcher S.A. did not have the funds with which to make the December payment and that in return for the Bank's promise to make the market study the appellant Brown agreed to (and in fact did) loan money to Lutcher S.A. so that the payment could be made. Therefore the Bank's alleged contract with Brown individually, unlike the Bank's alleged contract with the corporation (Lutcher, S.A.), would not fail for lack of consideration. For the Court's opinion notes that Brown claims that he "individually acted to his detriment." (Opinion, p. 13). Detriment to the promisee can afford consideration. *Clay v. Chesapeake & Potomac Telephone Co.*, 87 U.S. App. D.C., 284, 285, 184 F.2d 995, 996 (1950). *See also Violett v. Patton*, 5 Cranch (9 U.S.) 142, 150 (1809): "It is sufficient that something valuable flows from the person to whom it [the promise] is made; and that the promise is the inducement to the transaction." Appellant Brown should be given the opportunity properly to allege that the Bank's promise to make the market survey was a promise to Brown individually and induced "Brown's individual action in putting new funds into his corporation". In addition, now that jurisdiction is established, the plaintiffs should be able to amend their defective complaint to state other causes of action. *E.g.*, the opinion states, on the basis of the present pleadings, that "All relations between Lutcher and the Bank rested on formal loan contracts . . . ." (Opinion, p. 13.) Plaintiffs wish

to amend the complaint to show that the relations between Lutcher S.A. and the Bank also rested upon a settlement agreement partially described in paragraph 7 of the complaint (JA 4-5), whereby the Bank undertook to make a supplemental loan in settling its liability to Lutcher on an arbitration award. The amended complaint will seek to establish promises made by the Bank to plaintiffs to secure the settlement, besides those embodied in the loan contract which was but part of the settlement. The formal loan contract itself does not even mention the arbitration award or purport to be in settlement thereof. (JA 85-94.)

Plaintiffs should also have the opportunity to plead a cause of action in tort. The Court's opinion held that, on the present pleadings, no breach of any non-contractual duty was alleged. (Opinion, p. 12.) Plaintiffs seek the opportunity to include in an amended complaint, in addition to the prior allegations of knowing use of erroneous market data (complaint, par. 13, JA 8), allegations as to falsification of data in bad faith by or with the knowledge of Bank employees, for the specific purpose of causing economic harm and damage to appellants. The sufficiency of such allegations should in the first instance be determined by the District Court.

7. Subsequent to the filing and dismissal of the instant complaint in March of 1966, new Rule 44.1 of the Federal Rules of Civil Procedure became effective July 1, 1966. This new Rule provides for the raising of issues concerning foreign law in the pleadings, and for the District Court to determine such issues as questions of law. Now that the Inter-American Development Bank has been held subject to suit, difficult questions of conflict of laws may arise in determining what law should govern the Bank's hemisphere-wide operations, *e.g.*, place of performance in contract and *lex loci delictus* in tort. These questions may appropriately be raised and considered under amended pleadings in the District Court.

8. If the present order of affirmance is left to stand without the modification suggested by appellants, the effect of the District Court's order of dismissal will be unclear. Rule 41(b), F.R.C.P., provides:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

A dismissal "for lack of jurisdiction" unquestionably does not operate "as an adjudication upon the merits." *Costello v. United States,* 365 U.S. 265, 284-88 (1961). In the instant case, however, the motion to dismiss was not solely upon jurisdictional grounds, but also asserted that plaintiffs lacked standing and failed to state a claim upon which relief can be granted. (JA 18.) The order of dismissal simply recites that the motion is granted. (JA 151.) The opinion expresses agreement with defendant's attack upon the Court's jurisdiction and with its assertion that the complaint does not state a claim. (JA 151-55.) However, the discussion of the merits of the claim is introduced with the phrase: "Assuming *arguendo* that this Court does have jurisdiction . . ." (JA 154.) Such an "arguendo" ruling may lack the status of a holding.

It is unclear in any event what effect Rule 41(b) would accord to an order of dismissal based both upon a holding of lack of jurisdiction (*see* JA 152-54) and a further holding of failure to state a claim (*see* JA 154-55). Perhaps Rule 41(b) makes no provision for this eventuality because of plaintiff's failure to establish jurisdiction in the District Court would in itself preclude that Court from determining the merits of the claim. *Cf.* 5 MOORE, FEDERAL PRACTICE, § 41.14 (2d ed. 1966), at p. 1174:

> "Rule 41(b) recognizes that, in the nature of things, a dismissal for lack of jurisdiction, improper venue, or

> for lack of an indispensable party deals merely with a precondition that, unless satisfied, *precludes the court from going forward with the case to determine the merits of plaintiff's substantive claim.*" (Footnote omitted; emphasis supplied.)

See also Joy v. Hague, 175 F.2d 395, 396 (1st Cir. 1949), paraphrasing language from *McNutt v. General Motors Acceptance Corp.,* 298 U.S. 178, 182 (1936), and stating that the Supreme Court there declared ". . . it is the duty of the trial court, if it finds that jurisdiction does not exist, to proceed no further but to dismiss the suit . . ." The language in *McNutt* was based upon a statutory provision, 18 Stat. 472 (1875), former 28 U.S.C.A. § 80, which stated that:

> "If in any suit commenced in a District Court . . . it shall appear to the satisfaction of the said District Court at any time after such suit has been brought or removed thereto, that such suit does really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court . . . the said District Court shall proceed no further therein but shall dismiss the suit."

The statutory language relied upon in *McNutt* does not appear in the present Judicial Code. However, the law is apparently still the same, for the Reviser's note to present 28 U.S.C. § 1359 states:

> "Provisions of said § 80 for dismissal of an action not really and substantially involving a dispute or controversy within the jurisdiction of a District Court, were omitted as unnecessary. Any court will dismiss a case not within its jurisdiction, when its attention is drawn to the fact or even on its own motion." 28 U.S.C.A. following § 1359.

The entertaining of an amended complaint will obviate any question as to the effect of the District Court's acting on the merits after determining that it lacked jurisdiction.

CONCLUSION

For the foregoing reasons appellants respectfully pray that the judgment of affirmance entered July 13, 1967, be modified to provide that it is without prejudice to the right of the District Court to entertain a motion for leave to file an amended complaint.

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CERTIFICATE

I certify that the foregoing Petition for Modification of Judgment is presented in good faith and not for purposes of delay.

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Attorney for Appellants

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Modification of Judgment was mailed, first-class postage prepaid, this 21st day of August, 1967, to William D. Rogers, Esquire, 1229 - 19th Street, N.W., Washington, D. C., Attorney for Appellee.

JEREMIAH C. COLLINS